

**QUEST FOR A SUSTAINABLE LEGAL FRAMEWORK FOR THE
PROTECTION OF WOMEN'S RIGHT TO DIGNITY IN NIGERIA:
LESSONS FROM INDIA AND SOUTH AFRICA**

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**FACULTY OF LAW
UNIVERSITY OF MALAYA
KUALA LUMPUR**

2015

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**THESIS SUBMITTED IN FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE OF DOCTOR OF
PHILOSOPHY**

**FACULTY OF LAW
UNIVERSITY OF MALAYA
KUALA LUMPUR**

2015

ORIGINAL LITERARY WORK DECLARATION

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Title of Thesis ('this Work'): **QUEST FOR A SUSTAINABLE LEGAL FRAMEWORK FOR THE PROTECTION OF WOMEN'S RIGHT TO DIGNITY IN NIGERIA: LESSONS FROM INDIA AND SOUTH AFRICA**

Field of Study: **HUMAN RIGHTS AND ADMINISTRATIVE LAW**

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ABSTRACT

Nigeria and India are former British colonies. Both countries have similar constitutional framework on fundamental rights and directive principles of state policy. South Africa, with Dutch and British colonial legacies, on the other hand, is arguably, the most advanced constitutional democracy in Africa, and perhaps, in the world today. Nigeria, India and South Africa are developing countries in the Global South. They all lean strongly towards patriarchal and socio-religious mythology. These three countries belong to the same common law family of mixed legal systems. Legal transplant is, therefore, possible between them. Strategically speaking, Nigeria and India are the largest democracies in Africa and Asia respectively. Statistically, women outnumber men in South Africa while in Nigeria and India they constitute nearly half of the population. These women unfortunately are vulnerable. They suffer similar indignity of rape, marital rape, sexual harassment and other humiliation arising typically from patriarchal mind-sets, beliefs in certain socio-religious mythologies or ancient customary practices including castes, dowry and bride price, widowhood rites and son preference, which diminish the self-worth and dignity of women. On the basis of some of these abuses only, these countries have been derided as dangerous places for women to live in. Nigeria, in particular, is further ridiculed as being “notorious for violating international agreements”. The Nigerian legal framework, comprising constitutional guarantees, law and policy formulations as well as judicial responses, for the protection of the right to dignity of women, has been vigorously criticized for falling short of international law, unsustainable and incapable of supporting the United Nations’ Millennium Development Goal No. 3 on gender equality and empowerment of women. In South Africa, things are however different. The pragmatism of the Constitutional Court and the superior Bill of Rights provisions in the Constitution are legendary. They

easily rank among the best in the Global South as well as the Global North. India is also forward-looking. With basic legal and policy protection of women's right to dignity and sexual safety, coupled with judicial independence, creativity and activism in the interpretation of both positive and negative constitutional rights, India, too, is exemplary. It showcases and distinguishes the Indian Supreme Court, alongside the more outstanding Constitutional Court of South Africa, as consequential courts and activist tribunals in the Global South in the 21st Century. This thesis highlights certain abuses of the right to dignity of women in Nigeria, India and South Africa (as mirror of the most African and Asian women). It explores international law, as well as the transformational advances in the legal framework (constitutional, judicial, legislative and policy) governing the protection of women's right to dignity in India and South Africa, from which valuable lessons may reasonably be applied to bridge the inherent fundamental gaps in the existing Nigerian framework. Finally, it recommends reforms in the quest for a sustainable legal framework for the protection of the right to dignity of women in Nigeria. Incidentally those recommendations may also be useful to other developing common law jurisdictions in similar circumstances. This research is qualitative and doctrinal. It is based purely on library and desktop research including analysis and valuable information from legal provisions, case-law, as well as writings and opinions of eminent scholars and jurists.

ABSTRAK

Nigeria dan India adalah bekas tanah jajahan British. Kedua-dua negara tersebut mempunyai rangka perlembagaan yang serupa mengenai hak-hak asasi dan prinsip-prinsip arahan dasar negara. Afrika Selatan, dengan pusaka jajahan Belanda dan British, di sebaliknya, adalah demokrasi perlembagaan yang paling maju di Afrika dan mungkin di dunia pada masa kini. Nigeria, India dan Afrika Selatan adalah negara-negara membangun di Selatan Global. Mereka semuanya bersandar kuat kepada mitologi patriarki dan sosio-agama. Ketiga-tiga negara tersebut tergolong dalam keluarga common law yang sama yang bersifat sistem perundangan campuran. Maka pemindahan undang-undang mungkin boleh dilakukan di antara mereka. Secara strategik, Nigeria dan India adalah negara demokrasi terbesar di benua Afrika dan Asia masing-masing. Secara statistik pula, wanita melebihi lelaki di Afrika Selatan manakala di Nigeria dan India pula mereka berjumlah hampir separuh daripada penduduk negara masing-masing. Wanita-wanita ini malangnya terdedah kepada pelbagai penganiayaan. Mereka menghadapi penghinaan sama ada berbentuk rogol, rogol perkahwinan, gangguan seksual dan penghinaan lain yang timbul selalunya daripada pemikiran patriarki, kepercayaan dalam mithologi sosio-agama tertentu atau amalan adat kuno termasuk kasta, mas kahwin dan 'bride price', upacara perjandaan dan keutamaan kepada anak lelaki yang mengurangkan harga diri dan maruah kaum wanita. Berdasarkan beberapa penganiayaan ini sahaja, negara-negara tersebut telah diejek sebagai tempat berbahaya untuk diduduki oleh kaum wanita. Nigeria, khususnya, diejek lagi sebagai "terkenal kerana melanggar perjanjian antarabangsa". Rangka undang-undang Nigeria, yang terdiri daripada jaminan perlembagaan, undang-undang dan rumusan dasar serta keputusan kehakiman, untuk melindungi hak maruah wanita, telah bersungguh-sungguh dikritik kerana kegagalan dari segi undang-undang antarabangsa,

tidak bersifat mampan dan tidak mampu menyokong Matlamat Pembangunan Milenium No. 3 Pertubuhan Bangsa-Bangsa Bersatu mengenai kesaksamaan gender dan memperkasakan kaum wanita. Di Afrika Selatan, disebaliknya, kedudukan mengenai perkara yang sama berbeza. Pragmatisme Mahkamah Perlembagaannya dan peruntukan ‘Bill of Rights’ dalam Perlembagaan yang perkasa adalah legendari. Mereka dengan mudahnya menduduki tempat yang terbaik di Selatan Global serta di Utara Global. India juga berpandangan ke hadapan. Dengan perlindungan asas undang-undang dan dasar terhadap hak wanita untuk melindungi maruah dan keselamatan seksual mereka, ditambah pula dengan kebebasan, kreativiti dan aktivisme kehakiman dalam mengtafsirkan kedua-dua hak perlembagaan positif dan negatif, India, juga, adalah berteladan. Ia mempamerkan dan membezakan Mahkamah Agung India, di samping Mahkamah Perlembagaan Afrika Selatan yang lebih cemerlang, sebagai ‘gelanggang konsekuensial’ dan tribunal aktivis di Selatan Global pada Abad Ke-21. Tesis ini menumpukan perhatian pada dan menekankan penyalahgunaan tertentu mengenai hak maruah wanita tertentu di Nigeria, India dan Afrika Selatan sebagai mencerminkan wanita majoriti Afrika dan Asia. Ia menerokai undang-undang antarabangsa, serta kemajuan transformasi dalam rangka undang-undang (perlembagaan, kehakiman, perundangan dan polisi) yang mengawal perlindungan hak maruah wanita di India dan Afrika Selatan, dari mana pelajaran yang bernilai boleh dengan munasabah diperolehi untuk merapatkan semula jurang perbezaan asas dalam rangka undang-undang Nigeria yang sedia ada. Akhirnya, ia mengesyorkan pembaharuan dalam usaha untuk mencapai suatu rangka undang-undang yang mampan bagi melindungi hak maruah wanita di Nigeria. Secara kebetulan pula, cadangan tersebut adalah juga mungkin berguna untuk wilayah-wilayah membangun yang lain dalam keadaan yang serupa. Penyelidikan ini bersifat kualitatif dan doktrinal. Ia berdasarkan suatu penyelidikan perpustakaan dan destop semata-mata, termasuk analisa dan maklumat bernilai daripada peruntukan

perundangan, undang-undang kes, serta penulisan dan pendapat sarjana dan juris yang terkemuka.

ACKNOWLEDGEMENTS

In the course of this research, God was so faithful and gracious to me in exceeding ways too numerous to mention. I am ever so grateful.

I am sincerely most humbly and most respectfully grateful to my supervisor Dr. C. C. Gan, for being so generous with his time and vast knowledge, and for showing dedicated interest in my research and keeping me up and doing from the start of this research up till the very last moment. He was a supervisor's supervisor, humble to a fault, a research support partner and a spiritual guide. I learnt so much from him and I will forever remain indebted to him. I am also grateful to Prof. Norbani Binti Mohamed Nazeri, Deputy Dean (Postgraduate), Faculty of Law, University of Malaya, for her very kind heart.

My family stood by me and believed very strongly in me. I am most humbled by their unalloyed love, encouragement and affection and I am so glad that by the special grace of God, I have made them proud and not disappointed them in any way. I am particularly grateful to my dear wife Ijeoma, and my beautiful daughters, who had no option than to endure my absence and keep the faith, knowing that my sojourn was temporary and worthwhile.

I am also grateful to my friends and colleagues: Hon. Simeon Iwunze, Sir. Nnamdi Anyaehie, Prof. Nnamdi Obiaraeri, Prof. Uba Nnabue, Dr. Ine Nnadi, Prof. Iyk Dozie, Dr. Reginald Onuoha, Dr. Mubarak Adekilekun, Dr. Lukman Abdulrau'f, Messrs Innocent Habro Okoro, Amarachi Ogu, Kennedy Ekwurundu, Chris Madu, Ashis Tripathy, and particularly Prof. Uchefula Chukwumaeze, now Dean, Faculty of Law, Imo State University Owerri, for their kind words, encouragements and support at various times in the course of this research.

Above all, I am most grateful and thankful to Almighty God for life and good health!

DEDICATION

To the Glory of God, this thesis is dedicated to my wife and children, to my father Mr. Hyginus U.K. Ojilere and to the memory of my mother, Mrs. Agatha E. Ojilere.

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LIST OF CASES

ARA v. Sweden, Communication No: CAT/C/38/D/305/2006 of May 1, 2007 (initial submission on 25 September 2006).

“F” (Applicant) v. Minister of Safety and Security & 5 Ors, (The ‘F’ Case) CCT 30/11 [2011] ZACC 37 (Heard on 4 Aug 2011, Decided on 15 Dec 2011).

“In Re: Indian Woman Says gang raped on orders of village court published in Business & Financial News dated 23.01.2014” *Suo Motu Writ* Petition (Criminal) No. 24 of 2014, [Decided 28 March, 2014].

“Ken Saro-Wiwa and the Ogoni Nine” (International Pen & Ors (on behalf of Ken Saro-Wiwa) v. Nigeria (2000) AHRLR 212 (ACHPR 1998).

A.K.Gopalan v. State of Madras, A.I.R 1950 SC p.27.

Abacha v. Fawehinmi (2000) 6 NWLR (Pt. 660) 228.

Adefalu & Ors v. Governor of Kwara State & Ors (1984) 5 NCLR 766.

Adesanya v. The President of the Federal Republic of Nigeria (1981) All NLR 1 SC.

Aiki v. Idowu (2006) All FWLR (Pt. 239) 361.

Air India v. Nergesh Meerza, AIR 1981 SC 1829.

Akinbuwa v. Akinbuwa, (1998) 9 NWLR (Pt 564)100.

Akinnubi v. Akinnubi (1997) 46 LRCN 137.

Attorney General (Ondo State) v. Attorney General (Federation) (2002) 9 NWLR (Pt 772), 222.

Attorney General of Kaduna State v. Hassan, 2 NWLR (Pt 8) 483.

Aydin v. Turkey, 23178/9 (1997) ECHR, 75.

Bamidele Aturu v. Minister of Petroleum Resources, Suit No: FHC/ABJ/CS/591/09.

Bandhua Mukti Morcha v. Union of India & Ors (The Bonded Labour Case) AIR 1984 SC 802.

Beko Ransome Kuti & Ors v. Attorney-General of the Federation (Unreported) Suit No. M/287/92.

Centre for Enquiry into Health and Allied Themes (CEHAT) & Ors v. Union of India & Ors, *Writ* Petition (civil) 301 Of 2000 (Judgement delivered on 10/9/2003).
<http://nlrd.org/wp-content/uploads/2012/01/CEHAT-VS-UNION-OF-INDIA.pdf>.

Centre for Legal Research v. State of Kerala 3 SCJ 1986 SC 17.

Chairman, Railway Board v. Mr. Chandrama Das, AIR 2000 988.

Chief Gani Fawehinmi v. Gen. Sani Abacha, (2000) 4 SC (part II) 1.

Chintaman Rao v. State of Uttar Pradesh [1950] SCR 759.

Chuba Egolum v. Olusegun Obasanjo (1999) 7 NWLR Part 611, p. 355.

Constitutional Rights Project and Others v. Nigeria, (2000) AHRLR 227 (ACHPR 1999).

D.K. Basu v. State of West Bengal (1997) 1 SCC 416.

Edet v. Essien (1932) 11 NLR 47 (SC).

Edet Okon Iko v. The State (200) 14 NWLR (Pt. 732) 221.

Elizabeth Gumede v. President of the Republic of South Africa & Ors (2008) ZACC 23.

Eshugbayi Eleko v. Officer Administering Government of Southern Nigeria, (Appeal No 42 of 1930, judgment delivered on Tuesday, 24 March, 1931).

Femi Falana v. The African Union, Application No. 001/2011 <http://www.africaunion.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf> (12/10/2013)

Fawehinmi v. Akilu & Anor (1987) 1 NWLR Part 67, p.797 SC.

Fawehinmi v. Inspector General of Police (2002) 7 NWLR Part 767, p.606 SC.

Ferreira & Ors v. The State (2004) JOL 13027 (SCA).

Frances Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors, AIR 1981 SC 746.

Fred Egbe v. Honourable Justice Adefarasin (2003) 14 WRN 57.

Government of the Republic of South Africa v. Grootboom [2000] ZACC 19.

Governor of Lagos State v. Ojukwu, [1986] 1 NWLR 621.

Hussainara Khatoon v. Home Secretary, State of Bihar AIR 1979 SC 1369.

Idris Rai v. The State (2005) 7 NWLR (Pt. 925) 491.

Indra Sawhney v. Union of India AIR 1993 SC 477.

J v. National Director of Public Prosecutions & Anor (Childline South Africa & Ors as *amici curiae*) 2014 (7) BCLR 764 (CC).

Jacobson v. Massachusetts 197 US 11 (1905).

Janardhan Reddy v. State of Hyderabad, AIR 1951 SC 217.

Janatan Dal v. H.S. Chowdry, AIR 1993 SC 892.

Jegade v. The State (2000) 7 SCNJ 135.

Kalpana W/o Santosh Jadhav v. Hanma & Ors, 2013 Indlaw MUM 908; Criminal W.P. No. 63 of 2013, delivered on 27 September, 2013.

Keshavananda Bharati v. State of Kerala AIR 1973 SC 1461. *Suo Motu Writ* Petition (Criminal) No. 24 of 2014, [Decided 28 March, 2014].

Keyamo v. Lagos State House of Assembly (2000) 12 NWLR Part 680, p.196 CA.

Khatri v. State of Bihar AIR 1981 SC 928.

Khedat Majdoor Chetna Sanghat v. State of M.P. (1994) 6 SCC 260: AIR 1995 SC 31.

MC Mehta v. Union of India (Ganga Water Pollution Case) (1987) 4 SCC 463; AIR 198 SC.

M.H. Hoscot v. State of Maharashtra AIR 1978 SC 1548.

Maneka Gandhi v. Union of India AIR 1978 SC 215.

Mazibuko & Ors v. City of Johannesburg & Ors, 2010 (3) BCLR 239 (CC).

Medha Kotwal Lele & Ors v. Union of India & Ors, (2013) 1 SCC 297 (Judgement delivered on 19 October, 2012).

Medical and Dental Practitioners Disciplinary Tribunal v. Emewulu & Anor, [2001] 3 S.C.N.J. 106.

Mike Ozekehome & Ors v. President of the Federal Republic of Nigeria & Anor (1990) 2 WBRN 58.

Minerva Mills Ltd v. Union of India (1990) AIR SC 1987.

Minister of Health v. Treatment Action Campaign Case No. CCT/8/02, Heard on 2, 3 and 6 May 2002, Decided on 5 July 2002.

Mojekwu v. Mojekwu (1997) 7 NWLR Pt 512, p.283.

Mrs. Veena Sethi v. State of Bihar & Ors AIR 1983 SC 339.

MS v. S, 2011 (2) SACR 88 (CC).

Nar Singh Pal v. Union of India & Ors, AIR 2000 SC 1401.

Naz Foundation v. Union of India CWP 7455 of 2001.

Nnayelugo v. Nnayelugo (2008) All FWLR (Pt 401) 97.

Oguebe v. Inspector-General of Police (1999) 1 FHCLR 59.

Olawoyin v. Attorney-General of Northern Nigeria (1961) 2 SCNLR 5.

Om Kumar & Ors v. Union of India in Delhi Development Authority v. Skipper Construction & Anor, [2001] 4 LRI 1049.

P Rathinam v. S of Gujarat (1993) 2 Scale 631.

Peoples' Union for Democratic Rights v. Union of India, AIR 1982 1473; (1982) 3 SCC 235.

Prem Shankar Shukla v. Delhi Admin (1980) 3 SCR 855.

Ram Kumar v. S H Pradesh AIR 1995 SC 1995.

Rupa Ashok Hurra v. Ashok Hurra, AIR 2002 SC 1771.

S.P. Gupta v. Union of India & Ors, AIR 1982 SC 149.

Sakshi v. Union of India, (1999) Cr LJ 5025 (SC).

Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade & Ors, 2011(3) Mh.L.J. (Cri.) 73; 2011 Indlaw SC 94.

Sani Abacha v. Gani Fawehinmi (2000) 6 NWLR 228.

Shantistar Builders v. Narayan K Totame, (Shanti Star Builders case) (1990) 1 SCC 520.

Sheela Barse v. Union of India, AIR 1987 (1) 153.

Shilubana & Ors v. Nwamitwa (2008) ZACC 9.

Shri Bodhisattwa Guatam v. Ms. Subhra Chakraborty AIR 1996 SC 922; 1996 1 SCC 490.

Simon v. Police (1951) WLNLR 23

Sivarasa Rasiah v. Badan Peguam Malaysia [2010] 2 MLJ 333, (FC).

Social and Economic Rights Action Centre (SERAC) & Anor v. Nigeria, Communication No. 155/95

Solomon v. Ogbodo (1974) 4UILR 396.

State of AP v. Mc Dowell & Co (1996) 3 SCC 709.

State of Madras v. Row [1952] SCR 597.

State of Maharashtra v. Madhukar Narayan Mardikar, AIR 1991 SC 207.

State of Punjab v. Ramdev Singh AIR 2004 SC 1290.

State of Rajasthan v. Darshan Singh, (2012) 5 SCC789.

State through District Appropriate Authority-cum-Civil Surgeon, Faridabad (Complainant) v. Dr. Anil Sabhani, Prop. M/s Dr. Anil's Ultrasound Opp. G.H. Palwal, Faridabad & 2 Ors, Case No. 295/2 of 2001; Date of Institution: 5.11.2001/20.7.2004; Date of Decision: 28.3.2006.

State v. Makwanyane [1995] ZACC 3; 1995 (3) SA 391 (CC).

State v. Ogondiegon (1968) 1 NMLR 117.

Suchitra Srivastva v. Chandigarh Administration, AIR 2010 SC 235 (Civil Appeal No. 5845/2009, judgment delivered 28 August 2009).

Suresh Kumar Koushal v. Naz Foundation, Civil Appeal 10972 of 2013.

Szijarto v. Hungary Communication No. 4/2004, submitted on 12 February 2004.

Tara Singh v. State, AIR 1951 SC 441.

Thomas v. Olufosoye (1986) 1 NWLR Part 18, p.669 SC.

Tukaram v. State of Maharashtra, AIR 1979 SC 185.

Ukut v. The State (1965) 1 NRNLR 306.

Unity Dow v. Attorney-General of Botswana 1982 LRC (const) 623.

Upahar v. The State, (2003) 6 NWLR (Pt. 816) 230.

V.D. Bhanot v. Savita Bhanot, (2012) 3 SCC 183.

Van Eeden v. Minister of Safety and Security (Women's Legal Centre Trust as *Amicus Curiae*) 2003 (1) SA 389(SCA).

Vishaka & Ors v. State of Rajasthan & Ors (JT 1997 (7) SC 384); AIR 1997 SC 3011.

LIST OF STATUTES

Nigeria

Age of Customary Marriage Law, 1956.

Child Rights Act, 1993.

Child Rights Act, 2003.

Children and Young Persons Law, 1958.

Code of Criminal Procedure, 1973.

Constitution of the Federal Republic of Nigeria, 1999.

Criminal Code Act, Cap 77, Laws of the Federation of Nigeria, 1990 (applicable in the Southern part of Nigeria).

Ekiti State Gender-Based Violence (Prohibition) Law, 2011.

Female Genital Mutilation (Prohibition) Law, Bayelsa State, 2000.

Fundamental Rights (Enforcement Procedure) Rules, 1979.

Fundamental Rights (Enforcement Procedure) Rules, 2009.

Imo State Free, Compulsory Qualitative Education Law, 2011.

Law for the Monitoring of Maternal Mortality in Edo State and other Matters Connected Thereto, 2001.

Law to Amend Some of the Provisions of the Criminal Code Law Cap. 48 Laws of Bendel State 1976 as applicable to Edo State, 2000.

Law to Make it Unlawful to Infringe the Fundamental Rights of Widows and Widowers, and for other Related Matters, Enugu State, 2001.

Law to Prohibit Female Circumcision and Genital Mutilation, Edo State, 1999.

Law to Prohibit Girl Child Marriages and Female Circumcision or Genital Mutilation in Cross River State, 2000.

Law to Provide Protection against Domestic Violence and for Connected Purposes (Lagos State), 2012.

Legal Aid Act, Cap L9 Laws of the Federation of Nigeria, 2004.

Legal Aid Council of Nigeria, established by Decree No. 56, 1976.

National Human Rights Commission (NHRC) Act, 1995.

National Human Rights Commission (Amendment) Act, 2010.

Penal Code, Cap 345, Laws of the Federation of Nigeria, 1990 (Applicable in Northern Nigeria and the Federal Capital Territory, Abuja).

Penal Code, Cap 89 Laws of Northern Nigeria, 1963.

Rivers State Reproductive Health Service Law, No. 3, 2003.

Rivers State Schools Rights (Parents, Children and Teachers) Law No. 2, 2005.

Second Schedule to the Legal Aid Act, Cap L9 Laws of the Federation of Nigeria, 2004.

Sexual Offences Bill (SB. 279), 3 June 2015.

The Supreme Court Ordinance No. 4, 1876.

The Supreme Court Proclamation No. 6, 1900.

The Supreme Court Ordinance No. 6, 1914.

The Supreme Court Ordinance No. 23, 1943 (cap 211) Laws of Nigeria 1948.

The Native Courts Proclamation No. 9, 1900.

The Native Courts Ordinance (cap 142) Laws of Nigeria.

Trafficking in Persons (Prohibition) Law Enforcement and Administration (Amendment) Act, 2005.

Trafficking in Persons (Prohibition) Law, National Agency for the Prohibition of Trafficking In Persons (NAPTIP) Act, 2003.

Women's Reproductive Rights, Anambra State, 2005.

India

Code of Criminal Procedure, 1973 (as amended by the Criminal Law (Amendment) Act, 2013).

Constitution of India, 1950.

Criminal Law (Amendment) Act, 2013 (No. 13, 2013).

Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32, 2007.

Dowry Prohibition Act, 1961 (No. 28, 1961).

Indian Evidence Act, 1872.

Indian Penal Code 1860 (as amended by the Criminal Law (Amendment) Act, 2013).

Limitation of Dowry Law Chapter L 15, 1956.

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (also known as The Persons with Disability [PWD] Act).

Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

Protection of Children from Sexual Offences Act, 2012.

Protection of Women from Domestic Violence Act, 2005.

South Africa

Constitution of the Republic of South Africa, 1996.

Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32, 2007

Criminal Law (Sentencing) Amendment Act No. 38, 2007.

Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2013, Government Gazette No. 36645, 9 July, 2013.

Human Tissue Act 65 of 1983 (commenced on 12 July, 1985).

Human Tissue Amendment Act 51, 1989.

Prevention of Family Violence Act 1993, No.133, 1993.

England

Sexual Offences Act of England and Wales, 2003.

Rwanda

Rwanda Constitution, 2003.

Sri Lanka

Human Rights Commission of Sri Lanka Act, No. 21, 1996

Regional and International Legislative Frameworks

African Charter on Human and Peoples' Rights, 1981.

African Union Charter on the Rights and Welfare of the Child, 1990.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Optional Protocol, 22 December 2000.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Recommendation 19 (11th session, 1992) 1992. .

Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 10 December 1984, (entry into force 26 June 1987, in accordance with article 27 (1)).

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979.

Convention on the Rights of the Child (CRC), 20 November, 1989 (entry into force 2 September 1990, in accordance with article 49).

Declaration on the Elimination of Violence against Women (DEVAW), 20 December, 1993.

International Covenant for Economic, Social and Cultural Rights, 16 December 1966 (entry into force 3 January 1976, in accordance with Article 27).

International Covenant on Civil and Political Rights, 16 December 1966 (entry into force 23 March 1976, in accordance with Article 49).

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo. 11 July 2003.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Charter on Human and Peoples' Rights African Court on Human and Peoples' Rights, 9 June 1998.

Rome Statute of the International Criminal Court, 1998, (Done at Rome, 17 July 1998).

United Nations Declaration on Right to Mentally Retarded Persons, 1971.

United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action. (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993).

Universal Declaration of Human Rights, 1948.

LIST OF ABBREVIATIONS AND ACRONYMS

A.I.R: All India Reporter

AC: Appeal Cases

ACHPR: African Charter on Human and People's Rights

Afr. CHPR: African Charter on Human and People's Rights

Afr.J.Int.L: African Journal of International and Comparative Law

AHRLR: African Human Rights Law Report

All FWLR: All Federation Weekly Law Reports (Nigeria)

All NLR: All Nigeria Law Reports

ASEAN: Association of South East Asian Nations

AU: African Union

B.C.: Before Christ

BCLR: Butterworths Constitutional Law Reports (South Africa)

BMB: Bharatiya Mahila Bank

CA: Court of Appeal

CAL: Class Action Litigation

CAT: Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment

CC: Criminal Code

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women

CFRN: Constitution of the Federal republic of Nigeria

CJI: Chief Justice of India

CPA: Criminal Procedure Act

CPC: Criminal Procedure Code

Cr LJ: Criminal Law Journal of India

CRA: Child Right Act

CRC: Convention on the Rights of the Child or Child Rights Convention

CSA: Child Sexual Abuse

CSW: Commission on the Status of Women

DAW: Division for the Advancement of Women

DEVAW: Declaration on the Elimination of Violence Against Women

DFID: The Department for International Development (UK)

DVA: Domestic Violence Act

ECHR or ECtHR: European Court of Human Rights

ECOSOC: Economic and Social Council

ESCR: Economic, Social and Cultural Rights

EU: European Union

Eur. J. Int'l L: European Journal of International Law

FC: Federal Court

FCJ: Federal Court Judge

FGC: Female Genital Cutting

FGM: Female Genital Mutilation

FHC/ABJ/: Federal High Court Abuja (Nigeria)

FHC: Federal High Court

FSC: Federal Supreme Court

GA Res.: General Assembly Resolution

GB: Gender Budgeting

GBC: Gender Budget Cells

GCM: Girl-Child Marriage

HC: High Court

HIV/AIDS: Human Immune-Deficiency Virus/Acquired Immune Deficiency Syndrome

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICHR: Intergovernmental Commission on Human Rights, (also known as The ASEAN Charter)

IMF: International Monetary Fund

Indlaw SC: Legal Research Database and guide to Indian Law (Supreme Court Case Reports)

IPC: Indian Penal Code

IPV: Intimate Partner Violence

JCA: Justice of the Court of Appeal

JLFPHR: Justiciable Legal Frameworks for the Protection of Human Rights

JSC: Justice of the Supreme Court

JT: Judgement Today (India)

KJS: Kaduna Journal of Sociology

LFN: Laws of the Federation of Nigeria

LRCN: Law Reports of Courts of Nigeria

MDGs: Millennium Development Goals

Mh.L.J. (Cri.): Maharashtra Law Journal (Criminal Cases) (India)

MLJ: Malaysian Law Journal

NAPTIP: Law-National Agency for the Prohibition of Trafficking In Persons

NCLR: Nigerian Constitutional Law Reports

NGOs: Non-Governmental Organisations

NGP: National Gender Policy (Nigeria)

NHRC: National Human Rights Commission

NJFDHL: Nigerian Journal of Food, Drug and Health Law

NLRD: National Legal Research Desk, India

NMLR: Nigerian Monthly Law Report

NWLR: Nigerian Weekly Law Reports

NWP: National Women Policy (Nigeria)

OAU: Organisation of African Unity (now African Union, AU)

PC: Penal Code

PIL: Public Interest Litigation

PWD: Persons with Disability

RSA: Republic of South Africa

SACC or ZACC: South African Constitutional Court

SAHRC: South African Human Rights Commission

SAL: Social Action Litigations

SCA: Supreme Court of Appeal

SCC: Supreme Court Cases (India)

SCJ: Supreme Court Journal (India)

SCNJ: Supreme Court of Nigeria Judgements

SCNLR: Supreme Court of Nigeria Law Report

SCR: Supreme Court Reports

SDGs: Sustainable Development Goals

SSLMs: Support Structures for Legal Mobilisations

TNC: Transnational Corporations

UCC: Uniform Civil Code

UCCL: Uniform Code of Customary Law

UDHR: Universal Declaration of Human Rights

UILR: University of Ife Law Report (Nigeria)

UN: United Nations

UNAIDS: Joint United Nations Programme on HIV/AIDS

UNCRC: United Nations Convention on the Rights of the Child

UNDP: United Nations Development Programme

UNGA: United Nations General Assembly

UNICEF: United Nations Children Fund

UNIFEM: United Nations Fund for Women

UOI: Union of India

VAW: Violence Against women

VAWG: Violence Against Women and Girls

VDPA: Vienna Declaration and Platform for Action

WHO: World Health Organisation

WIN: Women in Nigeria

WRNLR: Western Region of Nigeria Law Reports

WRN: Weekly Reports of Nigeria

WUNRN: The Women's UN Report Program & Network

CHAPTER 1

INTRODUCTION

1.1 Background of The Study

The right to human dignity, which of course includes the dignity of women, is guaranteed in Nigeria,¹ India² and South Africa.³ Nonetheless, women in these countries and elsewhere⁴ still suffer varying degrees and patterns of abuse, humiliations, discrimination and indignities ranging from physical and psychological assault,⁵ trafficking,⁶ sexual abuse, rape and marital rape,⁷ *Sati* (self-immolation),⁸ dowry-related violations/death,⁹ *intimate femicide*¹⁰, and domestic violence arising from inherent notions of patriarchy,¹¹ traditional cultures/customary practices¹² and belief in socio-

¹ Section 34 of the 1999 Nigerian Constitution; Article 4 of the African Charter on Human and People's Rights, 1981 (Cap 10, Laws of the Federation of Nigeria, 1990).

² Article 21 of the Constitution of India, 1950.

³ Section 10, Constitution of South Africa, 1996.

⁴ Ortobag, T., Ozdemir, S., Bebis, H., & Ceylan, S. (2014). Perspectives of Young Adult Men Regarding Violence against Women: A Cross-sectional Study from Turkey. *Journal of Family Violence*, 1-10.

⁵ Ojilere, A., & Chukwumaeze, U. U. (2010). CEDAW and Gender-Based Discriminations Against Women in Nigeria. *Nigerian Journal of Food, Drug and Health Law (NJFDHL)*, 3(1), 95-105.

⁶ Monde-Anumihe, C. (2013). *Human Trafficking and Human Rights: The Movement of Women from Nigeria to Europe*. (Bachelor of Arts Syracuse University Honors Program Capstone Projects), Syracuse University, USA. (47).

⁷ Ray, S. (2014). *To Violate with Impunity: Legal Constructions of Marital Rape*. Paper presented at the XVIII ISA World Congress of Sociology (July 13-19, 2014); Onyejekwe, C. J. (2013). Nigeria: The Dominance of Rape. *Journal of International Women's Studies*, 10(1), 48-63; Ghosh, B. (2013). How does the legal framework protect victims of dowry and domestic violence in India? A critical review. *Aggression and violent behavior*, 18(4), 409-416.; Chika, I. S. (2011). Legalization of marital rape in Nigeria: a gross violation of women's health and reproductive rights. *Journal of Social Welfare & Family Law*, 33(01), 39-46.

⁸ An archaic Hindu practice which requires a widow to set themselves ablaze once her husband dies.

⁹ PuruShotam, N. (2004). Bride pride and grooming prejudices: race matters in marriage. *Untying the Knot: Marriage and Reality in Asian Marriage*, edited by GW Jones and K. Ramdas, 192-232.

¹⁰ This is the killing of women by their spouses and boyfriends. This is common in South Africa and the case of Oscar Pistorius, the internationally celebrated double amputee "blade runner", who shot and killed his girlfriend Reeva Steenkamp on 14 February 2013 is one of the latest world headlines. However, the judgement of Judge Thokozile Masipa which found on 12 September 2014 that the sprinter was not guilty of murder but manslaughter, (an offence which carries a maximum prison sentence of 15 years but can be reduced to community service) has been roundly criticized by the media, political actors and Women NGOs in South Africa. (See Alexander, H. and A. Laing (2014). Shadow of OJ Simpson falls over Oscar Pistorius after acquittal for murder. The Telegraph, UK, <http://www.telegraph.co.uk/news/worldnews/oscar-pistorius/11094653/Shadow-of-OJ-Simpson-falls-over-Oscar-Pistorius-after-acquittal-for-murder.html> (14/9/2014). The prosecution consequently appealed against this sentence and in December 2015, the South Africa's Supreme Court of Appeal found the Olympic athlete Oscar Pistorius guilty of murder and overturned the earlier manslaughter verdict, holding that the lower court did not correctly apply the rule of *dolus eventualis*, that is, whether Pistorius knew that a death would be a likely result of his actions. The court therefore ordered that the convict be sent back to the lower court for resentencing. The minimum sentence for murder in South Africa is 15 years, but judges can apply some discretion. (See BBC News Africa of 3 December 2015 titled "Oscar Pistorius guilty of murdering Reeva Steenkamp") <http://www.bbc.com/news/world-africa-34993002> (4/12/2015).

¹¹ Gregg, M. R. (2014). *An incomplete transition? Explaining the ongoing prevalence of violence against women in post-apartheid South Africa*. (Master of Arts), Simon Fraser University, SFU Library, Burnaby, British Columbia, Canada; Makama, G. A. (2013). Patriarchy and Gender Inequality in Nigeria: The Way Forward. *European Scientific Journal*, 9(17), 115-144. This includes son-preference which often leads to the unlawful abortion of female fetuses (See Nnadi, I. (2013). Son Preference—A Violation of Women's Human Rights: A Case Study of Igbo Custom in Nigeria. *Journal of Politics and Law*, 6(1), 134-141).

¹² Chika, I. S., & Nneka, U. (2014). Discriminatory Cultural Practices and Women's Rights among the Igbos of South-East Nigeria: A Critique. *Journal of Law, Policy and Globalization*, 25, 18-27.

religious mythology¹³ including wife inheritance and other obnoxious widowhood rites,¹⁴ as well as caste-related discriminations which are not so common in Nigeria.¹⁵ All these are a gross violation of the right to dignity of women guaranteed in the constitutions of these countries. Sometimes even Governments blame their failure to encourage gender equality or guarantee women's right to dignity on intractable patriarchal culture.¹⁶ This research focussed on the protection of women's dignity especially against rape and sexual harassment.

The quality of fundamental rights protection available in a country or system can be examined in terms of its contribution of human rights guarantees and enforcement mechanisms established to protect individuals and communities against the breaches of those rights as well as conditions that threaten the full enjoyment of those rights.¹⁷

Andrew Fagan¹⁸ argued that all human rights, (including the right to dignity of women) are universal 'guarantees' which are inherent in man *qua* man and that referring to 'these guarantees' as 'rights' suggests that they attach to particular individuals who can invoke them, and that they are of high priority, and the compliance with them is mandatory rather than discretionary.

This research is therefore an analytical evaluation of the legal framework for protecting the right to dignity of women, especially with respect to rape and breach of sexual independence, in Nigeria, India and South Africa. It finds that as between the three jurisdictions under review, the South African framework for the protection of the right to dignity of women is most elaborate because the guarantees enshrined in the Bill of Rights in its constitution combine with the independence, pragmatism and wide powers

¹³ Ojilere, A. (2008). The Customary Law and Socio-religious Mythology on the Rights of Women in Nigeria *Nigerian Journal of Public Law (NJPL)*, 1(1), 257-266; Ojilere, A., & Gan, C. C. (2015). Learning from the Indian Judiciary: New Directions for Securing Nigerian Women's Right to Dignity. *Asian Women*, 31(1), 81-106.

¹⁴ Durojaye, E., Okeke, B., & Adebajo, A. (2014). Harmful cultural practices and gender equality in Nigeria. *Gender and Behaviour*, 12(1), 6169-6181.

¹⁵ Leith-Ross, S. (1937). Notes on the Osu system among the Ibo of Owerri Province, Nigeria. *Africa*, 10(02), 206-220.

¹⁶ Merry, S. E. (2003). Constructing a Global Law-Violence against Women and the Human Rights System. *Law & Social Inquiry*, 28(4), 941-977 at 947.

¹⁷ Iyassu Menelik, G. Y. (2014). The Issue of Human Rights in Africa. *Africa University (Institute of Peace and Governance), Mutare Zimbabwe*, 8.

¹⁸ Andrew Fagan (2006), *Human Rights*, internet encyclopaedia of philosophy, <http://www.iep.utm.edu/hum-rts/>. (19/8/2014).

of its Constitutional Court to promote the right to dignity of women and fundamental rights generally. It finds also that any constitutional or legislative defect in the Indian legal framework is effectively cured by the creativity and activism of its Supreme Court which has been described as ‘one of the most powerful Constitutional Courts in the world.’¹⁹ Lastly, it finds show that fundamental gaps exists in the constitutional guarantees, legislative provisions, right of access to justice, judicial attitude, as well as in the procedural rules for the enforcement of the right to dignity of women in Nigeria,²⁰ and the quest for valuable lessons which may be applied to bridge these gaps is the reason for this research. Accordingly, the research recommends that Nigeria should, in the long run, combine the “constitutional borrowing”²¹ from South Africa with the “judicial borrowing”²² from India to strengthen its framework for the protection of the right to dignity of women as a *sine qua non* for effective sustainability, globalization and democratization.²³

At the end of this research, it would have become certain that a *consequential court*²⁴ can exercise its inherent power of *legisprudence*²⁵ to bridge the gaps in existing law and, even in the absence of an existing law and policy, and set the agenda for transformative structural and socio-political change for the protection of the right to

¹⁹ Manoj Mate (2013), “Public Interest Litigation and the Transformation of the Supreme Court of India” in Chapter 10, Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan (ed.) *Consequential Courts: Judicial Roles in Global Perspective*, 2013 Cambridge University Press, USA., p.262.

²⁰ Kura, S. M., & Yero, B. U. (2013). An analysis of Gender inequality and National Gender Policy in Nigeria. *International Journal of Scientific & Engineering Research*, 4(1).; Sehinde, B. K. (2013). An Overview of Legal and Implementation Framework of Nigeria’s National Gender Policy. In R. I. Ako-Nai (Ed.), *Gender and Power Relations in Nigeria* (pp. 87-100). Plymouth, UK: Lexington Books.

²¹ D.M. Davis, “Constitutional Borrowing: The Influence of Legal Culture and Local History in The Reconstitution of Comparative Influence: The South African Experience,” (2003) 1 Int’l J. Const. L 181-195. It must also be noted that even the classical uniqueness of the South African Bill of Rights was a product of “constitutional borrowing.” (See Jermy Sarkin, “The effect of Constitutional Borrowings on the Drafting of South Africa’s Bill of Rights and interpretation of Human Rights Provisions” (1998-1999) 1 U. Pa. J. Const. L 176).

²² Apart from the judicial advances in India, the Indian Constitution, alongside those of South Africa, Canada and Germany ranks among the best four “especially influential as benchmarks for modern constitution-making.” (See Moseneke, D. (2012). 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa, *The. Geo. LJ*, 101, 749, page 12, citing Prof David Law and Prof Mila Versteeg’s “The Declining Influence of the American Constitution” then to be published in *New York University Law Review*, Vol. 87, 2012.

²³ South Africa and India offer basic examples because “the independence and effectiveness of the Supreme Court of India and the Constitutional Court of South Africa, especially with regards to democratization and structural transformation in public and private spheres of their respective countries are gradually creating what can be called a constitutionalism of the Global South.” (See Daniel Bonilla Maldonado (ed), “Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia.” 2013, Cambridge University Press, New York, USA).

²⁴ This phrase is synonymous with “judicial activism” as evident in Kapiszewski, D., Silverstein, G., & Kagan, R. A. (2013). *Consequential Court - Judicial Roles in Global Perspective*. New York, USA: Cambridge University Press.

²⁵ This word was explained to mean the power of courts to “make laws” in Roznai, Y. (2014). *Legisprudence Limitations on Constitutional Amendments? Reflections on The Czech Constitutional Court’s Declaration of Unconstitutional Constitutional Act (April 10, 2014)*, 8(1), 29-57.

dignity of women anywhere and especially for the constitutional development and democratization of the Global South.²⁶

1.2 Statement of the Problem

This research is premised on several findings²⁷ which confirm the multi-faceted violation of women's right to dignity in Nigeria and the fact that the available legal framework for the protection of women's right to dignity is deficient, does not conform to international law and therefore cannot guarantee women's dignity and human rights nor can it meet the Millennium Development Goal No. 3, that is, promoting gender equity and empowerment of women.²⁸ It is therefore necessary to seek and apply new lessons in the quest for a sustainable legal framework for the protection of the right to dignity of women in Nigeria.

²⁶ "Global South" describes third world/developing countries as opposed to developed/western countries of the "Global North". (See Daniel Bonilla Maldonado (ed), "Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia." 2013, Cambridge University Press, New York, USA, page 5).

²⁷ Ojilere, Aloy "The Customary Law and Socio-religious Mythology on the Rights of Women in Nigeria." Nigerian Journal of Public Law (NJPL) Vol.1 No. 1 (2008), Faculty of Law, University of Nigeria, Enugu campus. Pages 257-266; Olong Mathew Adefi: 'Cultural Practices and Traditional Beliefs as Impediments To The Enjoyment of Women's Rights in Nigeria', Journal of Contemporary Legal Issues JCLI Vol. 1, No. 1, 2009 (A publication of the Nigerian Bar Association, Idah branch, Kogi State, Nigeria) p.117-131; A.A. Idowu, Women's Rights, Violence and Gender Discrimination-The Nigerian Circumstances in Gender and Power Relations in Nigeria, Ronke Iyabowale Ako-Nai (ed) 2013 Lexington Books, Plymouth, U.K., p. 31-45 esp p. 32; Adesina Coker: Critical Appraisal of Domestic Violence in Nigeria, in Chapter 6 of Gender and Power Relations in Nigeria, Ronke Iyabowale Ako-Nai (ed) 2013 Lexington Books, Plymouth, UK, p. 77-86; Akpo Offiong Bassey, Religion, Culture and tradition in Cross River State in Discrimination, Religion and Culture: A Theoretical Approach- Eliminating Discrimination Against Women-Constitutional Rights Project, 1995 pp 24-25; Chukwudum Okoli. "Gender relations: An Igbo cultural perspective" (2001) WOREC Journal of Gender studies, Maiden Edition. Vol. 1 No. 1, Imo State University, Owerri, pp.39-4; E.N. Chegwe Legalism And The Realization of the Right to Life, (2009) Nigerian Journal of Public Law (NJPL) Vol.2 No.1, Department of Public and Private Law, Faculty of Law, University of Nigeria. Pp. 226-243; Ezebuilo Ukwueze: "Bride Price: Another source of violence against women", Published in Chapter 9 Joy Ngozi Ezeilo & Josephine Alumanah ed. Bride Price And The Implications For Women's Rights in Nigeria, Women Aid Collective 2008 p.115 at 120; Erhum, M. O. (2013). An Appraisal of the Protection of Women's Rights Under Nigerian Laws. In R. I. Ako-Nai (Ed.), *Gender and Power Relations in Nigeria* (pp. 61-76). Plymouth, U.K: Lexington Books.; Dada J. A. (2013). Human Rights Protection in Nigeria: the Past, the Present and Goals for Role Actors for the Future. *Journal of Law, Policy and Globalization*, 14, 1-13; DadaJ. A. (2012). Impediments to Human Rights Protection in Nigeria. *Ann. Surv. Int'l & Comp. L.*, 18, 67.

²⁸ Promoting gender equity and empowering women is item No. 3 of The Millennium Development Goals endorsed by the United Nations in September 2000, and declared to be actualised globally by 2015. However, with the September 25, 2015 adoption by the UN of a new sustainable development agenda consisting of 17 Sustainable Development Goals, "Gender Equality" becomes Sustainable Development Goal (SDG) No. 5. It is of interest to note that the protection of 'women' is now extended to include 'girls'. Cumulatively, these 17 SDGs comprise 169 targets which are set to end poverty, protect the planet (climate change) and ensure prosperity for all, on the premise that governments, civil society, the private sector and individuals plays their respective roles optimally (<http://www.un.org/sustainabledevelopment/sustainable-development-goals/>). The UN recommends that the specific targets of each SDG should be achieved over the next 15 years. One of the most remarkable features of the SDGs, according to Yonglong Lu, Nebojsa Nakicenovic, Martin Visbeck & Anne-Sophie Stevance is that "The SDGs place greater demand on the scientific community than did the Millennium Development Goals (MDGs), which they replace." (See: Lu, Y., Nakicenovic, N., Visbeck, M., & Stevance, A. S. (2015). Policy: Five priorities for the UN Sustainable Development Goals-Comment. *Nature*, 520(7548), 432-433). Jeffrey Sachs had expressed early support for the MDGs because they set the pace for the SDGs in the first instance (Sachs, Jeffrey D. "From millennium development goals to sustainable development goals." *The Lancet* 379.9832 (2012): 2206-2211).

1.3 Objective of the Research

The core objective of this research is to explore the fundamental gaps in the current legal framework for the protection of the right to dignity of women in Nigeria and seek useful lessons from India and South Africa with which to bridge them.

To realise this objective, the researcher seeks to:

1. Explore the international framework for the protection of the right to dignity of women.
2. Critique the framework for the protection of women's right to dignity in Nigeria India and South Africa.
3. Highlight the fundamental gaps in the framework for the protection of women's right to dignity in Nigeria *vis-à-vis* the advances in the legal framework of India and South Africa.
4. Make recommendations, based on the advances in the other frameworks particularly India and South Africa, for bridging the existing fundamental gaps and advancing the quest for a sustainable legal framework for protecting the right to dignity of women in Nigeria.

1.4 Research Questions

This research will seek to answer the following questions:

1. What is the legal framework for protecting the right to dignity of women in international law?
2. What is the existing national framework for the same protection in Nigeria, India and South Africa?
3. What fundamental gaps exists in the existing Nigerian framework *vis-à-vis* the advances in the other frameworks?

4. Based on the lessons from India and South Africa, what recommendations need be suggested for bridging the existing fundamental gaps and advance the quest for a sustainable legal framework for the protection of the right to dignity of women in Nigeria?

1.5 Methodology of the Research

This research is qualitative, doctrinal and based on both library and desktop research including internet sources from renowned databases and websites. Data was collected from Primary and Secondary Sources. Most of the information for this research were obtained from books and materials from the Library and reliable internet databases [LexisNexis, Westlaw Malaysia, Westlaw international, HeinOnline, ProQuest, ebrary, Jstor, Ebsco] at the University of Malaya Law library and Main library. Other vital information were obtained from university libraries and offices of some NGOs and UN agencies in Nigeria.

Google Chrome and Google Scholar were the main search engines because they provide quick search suggestions and authoritative academic literature respectively. Internet Explorer and Mozilla Firefox were also be used. Westlaw Malaysia has an India portal which provided access to every relevant constitutional and statutory provision (enactments, amendments and repeals), judgements of High Courts and the Supreme Court in India as well as commentaries and case analysis. Westlaw International provided similar information with respect to South Africa and Nigeria. Other information on South Africa were accessed from official websites of its Constitutional Court, the Supreme Court of Appeal, and the Department of Justice and Constitutional Development. It also involved the use of data collected from official government reports, reports of Non-Governmental Organisations, reports of UN human rights bodies

(accessed from the official website of the United Nations), academic journals, expert opinions, as well as research, newspapers and media reports. Additional relevant information were obtained from research results, data and vital information available from the publications and records of prominent Nigerian, Indian and South African activists and NGOs.

Specifically, to answer the research questions and realise the set objective, the thesis highlights the gaps inherent in the 1999 Nigerian Constitution (including the Fundamental Rights (Enforcement Procedure) Rules 2009, the National Gender Policy, the Nigerian Criminal jurisprudence and relevant legislation as well as judicial attitude to the protection of women's right to dignity in Nigeria. It also explores the advances in the legal frameworks (constitutional guarantees and right of access to courts, law and policy, as well as the judicial attitude of creativity, activism and pragmatism) for the same protections in India and South Africa as well as in international law,²⁹ including the African regional human rights mechanism. The thesis also recommends valuable lessons based on these advances, which may be reasonably and realistically transplanted to Nigeria (based on similarities in in constitutional framework on fundamental rights and directive principles between India and Nigeria, as well as similarities in plural or 'mixed' legal systems between India, Nigeria and South Africa) to bridge the many fundamental gaps in the existing legal framework and set it on the path to globalization and sustainability.

It is humbly believed that while Nigeria has many valuable lessons to learn from both India and South Africa, some of these lessons, especially on the constitutional advances

²⁹ "The purpose of international law is to influence states to recognize and accept human rights, to reflect these rights in their national Constitutions and laws, to respect and ensure the enjoyment through national institutions, and to incorporate them into national ways of life." See L. Henkin, "International human rights and rights in the United States." In T. Meron (ed) (1984) Human Rights in International Law: Legal and Policy Issues 5.

in South Africa, will also be beneficial to India³⁰ as well as other developing democracies in Asia and Africa.

1.6 Significance of the Study

The significance of this study includes:

1. Human dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.³¹ The UN Declaration on the Elimination of Violence Against Women (DEVAW) also emphasise among member states, ‘the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings’ and bearing in mind that ‘those rights and principles are enshrined in international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.’³²
2. The UN is increasingly focused on emerging threats to the rule of law and the root causes of conflict, including economic and social justice issues, particularly, since festering grievances based on violations of economic and social rights are increasingly recognised for their potential to spark violent conflict, which

³⁰ There is need for India to codify the ESC Rights in the Directive Principles of State Policy in its Constitution which the courts currently apply as “implied” fundamental rights into positive fundamental rights, just as in the case of the Bill of Rights in South Africa.

³¹ See Preamble to the Universal Declaration of Human Rights, 1948.

³² United Nations General Assembly. <http://www.un.org/documents/ga/res/48/a48r104.htm>. (15/3/2014).

suggests that “greater efforts are needed to ensure a unified approach to the rule of law.”³³

3. The existing legal framework for redressing the violation of women’s dignity in Nigeria, including the National Gender Policy of 2006, ‘has remained more theoretical and academic than practical,’³⁴ and in comparison to India and South Africa,³⁵ these protections, even against rape,³⁶ are short of international standard³⁷ and the least progressive in terms of adequacy³⁸ and interpretation of constitutional guarantees,³⁹ statutory provisions,⁴⁰ access to justice, judicial activism,⁴¹ policy implementation⁴² and pro-active legislature,⁴³ thus, justifying

³³ French, D., & Samuel, K. (2015). Transitional Justice in Times of “Exponential Change”: Constructing Normative Frameworks Fit for Purpose—The Importance of General International Law *Current Issues in Transitional Justice* (pp. 185-208): Springer, at 166, citing the 2011 UN Report on “Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”

³⁴ Erhum, M. O. (2013). An Appraisal of the Protection of Women’s Rights under Nigerian Laws. In R. I. Ako-Nai (Ed.), *Gender and Power Relations in Nigeria* (pp. 61-76). Plymouth, U.K: Lexington Books.

³⁵ Ogunniran, I. (2010). Enforceability of Socio-Economic Rights: Seeing Nigeria through the Eyes of Other Jurisdictions. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 1(September 2010), 73-87.

³⁶ Adesina Coker: Critical Appraisal of Domestic Violence in Nigeria, in Chapter 6 of *Gender and Power Relations in Nigeria*, Ronke Iyabowale Ako-Nai (ed) 2013 Lexington Books, Plymouth, UK, Pp. 77-86; Ojilere, Aloy (2009): “Domestic Violence and the Law in Nigeria.” *CWGS- Journal of Gender Studies* Vol. 1 No.4 (June 2009), Centre for Women and Gender Studies, Imo State University, Owerri, pp. 75-87; Moore, A. J. (2005). Endangered species: Examining South Africa’s national rape crisis and its legislative attempt to protect its most vulnerable citizens. *Vanderbilt Journal of Transnational Law*, 38, 1469-1498; D. A. Ijalaye: The Nigerian law of rape in the context of global development, *Ibadan Bar Journal*, Vol. 3 No. 1 (2004). P.6.

³⁷ Oby Nwankwo, Nigeria’s Representative on the CEDAW Committee has said that Nigeria is “‘notorious for violating international agreements.” See *Nigerian vanguard Newspaper* of 22 September, 2013, interview by Josephine Igbinovia, <http://www.vanguardngr.com/2013/09/nigeria-is-notorious-for-abandoning-international-treaties-oby-nwankwo/> (26/9/2013).

³⁸ NI Aniekwu ‘Legalising Cairo: Prospects and Opportunities for Reproductive Rights in Nigeria’ (2006) 1 & 2 CODESRIA Bulletin 49 (quoted in Uju Peace Okeke “A Case For The Enforcement of Women’s Rights As Human Rights in Nigeria”; The Women’s UN Report Program & Network (WUNRN) <http://www.wunrn.com> (16/7/2014).

³⁹ Mercy Onaodowan Erhum, (2013). “An Appraisal of The Protection of Women’s Rights Under Nigerian Laws.” In Ronke Iyabowale Ako-Nai (ed.) *Gender and Power Relations in Nigeria*, Lexington Books, Plymouth, U.K., p. 61-76.

⁴⁰ Adesina Coker, (2013) “Critical Appraisal of Domestic Violence in Nigeria.” In Chapter 6 of Ronke Iyabowale Ako-Nai (ed.) *Gender and Power Relations in Nigeria*, Lexington Books, Plymouth, UK, Pp. 77-86; Ojilere, Aloy “A Comparative Critique of The Law on Rape in Nigeria and Malaysia,” *Nigerian Journal of Food, Drug and Health Law (NJFDHL)* Vol. 5 No.1 (2012) Faculty of Law, Kogi State University, Anyigba. Pp. 41-53.

⁴¹ In *Akinnubi v. Akinnubi* (1997) 46 LRCN 137, the Nigerian Supreme Court endorsed the validity of a Yoruba customary law which denied women the right to obtain Letters of Administration or be appointed as co-administrators of the estate of their late husbands. However, in the latter cases of *Nnayelugo v. Nnayelugo* (2008) All FWLR Pt 401 p.97 and *Mojekwu v. Mojekwu* (1997) 7 NWLR Pt 512, p.283 where similar issues were raised, the Court of Appeal rightly gave a varied judgments which have been applauded as a *locus classicus*.

⁴² Even the laudable provisions of the CEDAW and the National Gender Policy of Nigeria can hardly be implemented due to a number of constitutional and socio-political inhibitions including a defective and deficient legal framework. See Benson Kunle Sehinde: An Overview of Legal and Implementation Framework of Nigeria’s National Gender Policy. in Chapter 7 of *Gender and Power Relations in Nigeria*, Ronke Iyabowale Ako-Nai (ed) 2013 Lexington Books, Plymouth, UK, p. 87-100; Mercy Onaodowan Erhum, An Appraisal of The Protection of Women’s Rights Under Nigerian Laws in *Gender and Power Relations in Nigeria*, Ronke Iyabowale Ako-Nai (ed) 2013 Lexington Books, Plymouth, U.K., p. 61-76.

⁴³ In India, the Indian Penal Code 1860 (as amended by the Criminal Law (Amendment) Act 2013); The Code of Criminal Procedure, 1973 (as amended by the Criminal Law (Amendment) Act, 2013) creates new sexual offences, criminalizes marital rape and increased punishment for rape and sexual offences. And in South Africa, apart from Prevention of Family Violence Act 1993, No.133 of 1993 which had earlier criminalized marital rape, Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 now states that “Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before the court, with caution, on account of the nature of the offence.” S.59 of the same Act also attempts to protect survivors stating that “In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw an inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.”

Criminal Law (Sentencing) Amendment Act No. 38 of 2007, which offered minimum sentencing guidelines for rape, along with unsatisfactory and prohibited reasons for justifying a lesser sentence in Section 3 (aA) states that “When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition

the necessity for this research.

4. Weak legislation and human rights violations may threaten political stability, economic development and mutual co-existence at home, international relations, as well as territorial and regional peace.⁴⁴
5. A globalized, realistic and sustainable legal framework is necessary to set Nigeria on the agenda to guarantee sustainable promotion of democracy and human rights, especially the protection of the right to dignity of women and the girl-child in furtherance Goal No 3 of the UN Millennium Development Goals (MDGs).⁴⁵

1.7 Choice of Jurisdictions

The choice of the jurisdictions for this research is justified thus:

1. The three countries are patriarchal,⁴⁶ multi-cultural, multi-lingual, multi-religious and multi-ethnic societies (India has over two thousand ethnic groups)⁴⁷ and nearly each one practices its own customary law and socio-religious mythology alongside the regular legal system.⁴⁸

of a lesser sentence: (i) The complainants previous sexual history: (ii) an apparent lack of physical injury to the complainant (iii) an accused person's cultural or religious beliefs about rape or (iv) any relationship between the accused person and the complainant prior to the offence being committed." But in Nigeria, Marital rape is even justified by the combined interpretation of Section 357 of the Criminal Code Act Cap 77, Laws of the Federation of Nigeria, 1990 (applicable in the Southern part of Nigeria) defines rape as unlawful carnal knowledge of a woman or girl by *any person* without her consent, or with her consent, if it was obtained unlawfully, and by Section 6 of the same Code which defines unlawful carnal knowledge as "carnal connection which takes place otherwise than between husband and wife." The Fundamental Rights (Enforcement Procedure) Rules is also fraught with a number of inherent hiccups and Parliament seems not to bother.

⁴⁴ Hafner-Burton, E. M. (2014). A social science of human rights. *Journal of Peace Research*, 51(2), 273-286.

⁴⁵ Promoting gender equity and empowering women is item No. 3 of The Millennium Development Goals endorsed by the United Nations in September 2000, and declared to be actualised globally by 2015. This is now Goal No. 5 of the new UN Sustainable Development Goals (SDGs) which was launched on 25 September, 2015. It provides for the equality and empowerment of 'women and girls.'

⁴⁶ Reed, H. (2014, July). Race and Patriarchy: Gender and Migration in South Africa During and after Apartheid. In *XVIII ISA World Congress of Sociology (July 13-19, 2014)*. Isaconf; Kanu, I. A. (2014). An Enquiry into the Religio-Cultural Experience of Women in Nigeria: Towards a Philosophy of Reciprocity. *AFRREV LALIGENS: An International Journal of Language, Literature and Gender Studies*, 1(2), 50-60; Karandikar, S., Frost, C., & Gezinski, L. (2014). Patriarchy and Gender-Based Violence: Experiences of Female Sex Workers in India. *International Journal of Social Work*, 1(1), 1-14.

⁴⁷ US Department of State (17 April 2012) "Background Note: India"; Nigeria is estimated to have nearly two hundred and fifty ethnic groups while Section 6(1) of South Africa's Constitution recognizes eleven official languages, based on its ethnic diversity.

⁴⁸ The Nigerian Legal System is a British Common Law heritage comprising English statutes of general application subsequently enacted and incorporated into municipal law by the Nigerian legislature, Statutory Law, Islamic Law of the North and Customary

2. Nigeria and India are common law countries, former British colonies and with plural legal systems, and while Nigeria is the most populous country in Africa, the largest democracy in Africa, the fourth largest democracy in the world and with 49.36 per cent female population,⁴⁹ India is the largest democracy in the world, the second most populous country in Asia, after China and with 48.37 per cent female population.⁵⁰ And in the South African population, women outnumber men. It is therefore logical, that any advance or otherwise to the dignity of women in these countries affects a significant portion of Africa and Asia's population, as well as the realization of the Millennium Development Goals.
3. Nigeria and India have similar constitutional framework on fundamental rights and directive principles of state policy. South Africa, with Dutch and British colonial legacies, on the other hand, is the most advanced constitutional democracy in Africa and possibly in the world today.⁵¹
4. South Africa is the most developed democracy in Africa⁵² and its Constitution of 1996 is arguably one of the best in the world because it enshrines first, second and third generation rights and guarantees in the Bill of Rights, and the wide powers and independence of its Constitutional Court.⁵³

Law of the South. While Islamic Laws are religious prescriptions rooted in Holy Quran and the *Hadith* of the prophets, Customary Laws are the unwritten native laws, practices and customs of *a people* as inherited by subsequent generations from their ancestors. This similarity in colonial history and legal system is shared with India. South Africa practices a 'mixed' or 'hybrid' legal system which cuts across many traditions: The 'civil law' inherited from the Dutch, The 'common law' inherited from England and the 'customary law' or 'African Customary Law' inherited from indigenous Africans of various tribal origins.

⁴⁹ 2012 World Bank Report.

⁵⁰ (Source: UN Human Development Report 2013).

⁵¹ Daniel Bonilla Maldonado (ed), "Constitutionalism of the Global South: The Activist Tribunals of India, South Africa a, and Colombia." 2013, *op.cit.*

⁵² Naudé, W. (2013). Development Progress in sub-Saharan Africa: Lessons from Botswana, Ghana, Mauritius and South Africa. *Achieving Development Success: Strategies and Lessons from the Developing World*, 284-292.

⁵³ Daniel Bonilla Maldonado (ed), "Constitutionalism of the Global South: The Activist Tribunals of India, South Africa a, and Colombia." 2013, *op.cit.* Also, in South Africa, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. <http://www.justice.gov.za/sca/historysca.htm> (2/6/2014).

5. Judicial activism in the protection of women's right to dignity and fundamental rights generally is particularly prominent in India⁵⁴ due to several innovations of the Indian Supreme Court and the activism of the likes of Justice P.N. Bhagwati, manifest in the Epistolary jurisdiction of courts, Public Interest Litigation (PIL), Class Action Litigation (CAL), Legal Aid, the *Vishaka Guidelines*, the *Rule in Sheela Barse*, the broad interpretation of Article 21 (Right to life and liberty), the three-step rule of Constitutional Proportionality, as well as the liberal interpretation and judicialization of the non-justiciable directive principles of state policy in the Indian Constitution, among others. All these portray the Supreme Court of the Indian as 'one of the most powerful Constitutional Courts in the world.'⁵⁵
6. Nigeria stands to learn many reasonable lessons from the constitutional, legislative and judicial advances in both the Indian and South African framework for the protection of the right to dignity of women, especially with regards to the interpretation of fundamental rights in India and the judicialization of socio-economic rights in South Africa.
7. Nigeria, India and South Africa are developing countries in the Global South and women's dignity is a common issue among them. Most importantly, legal transplant is reasonable and possible between them because they belong to the same 'Common law family'⁵⁶ of complex plural systems (countries with hybrid legal systems comprising common law, religious law and customary law).⁵⁷

⁵⁴ Justice Palok Basu. (2002) *Law Relating to Protection of Human Rights Under The Indian Constitution and Allied Laws* Modern Laws Publications, Allahabad, India. P.83

⁵⁵ Manoj Mate, "Public Interest Litigation and the Transformation of the Supreme Court of India" in Chapter 10, Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan (ed.) *Consequential Courts: Judicial Roles in Global Perspective*, 2013 Cambridge University Press, USA., p.262. Similarly, Deputy Chief Justice of the South African Constitutional Court Dikgang Moseneke, has asserted that "The Courts in Common law countries like India and South Africa are the active and liberal transformative agent of positive change. They work independently and fearlessly to initiate positive constitutional changes."

⁵⁶ Spamann, H. (2009). Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law. *BYU L. Rev.*, 1813, at 1830-1831.

⁵⁷ Orucu, E. (2008). What Is a Mixed Legal System: Exclusion or Expansion? *J. Comp. L.*, 3, 34.

1.8 Scope and Limitation

This research is based purely on the legal framework for protecting the right to dignity of women in Nigeria, India and South Africa only. It does not cover any other jurisdiction. The research lays great emphasis on women's sexual independence and the legal framework for the protection of the sexual dignity of women in these jurisdictions. However, the research did not include the trafficking in women for sex and does not address the sociological question of why, in spite of formidable legal framework, the violation of women's sexual dignity persists, especially in South Africa⁵⁸ and India.⁵⁹

1.9 Definition of Terms

Grammar constitutes the basis of legal and political thought. The grammar of modern constitutionalism determines the structure and limits of key components of contemporary legal and political discourse.⁶⁰ It is, thus, imperative to explain the meaning and import of certain terminologies which are core to this thesis.

1.9.1 Human Dignity

Etymologically, "dignity" is derived from the Latin word '*dignitas*', which translates as 'worth'. Human dignity therefore means "human worth". The precise origin of human dignity is unknown and it is humbly submitted that it is a concept which is as old as creation of man. However, in Nigeria, the view has been expressed that the African

⁵⁸ "Violence against women (VAW) in South Africa remains rampant, irrespective of human rights- focused laws passed by the government." Ramadimetja S. Mogale, Kathy Kovacs Burns, and Solina Richter (2012) "Violence Against Women in South Africa: Policy Position and Recommendations" *Violence Against Women*, May 2012, 18(5): 1 <http://vaw.sagepub.com> (24/9/2013).

⁵⁹ In one report, economists Siwan Anderson and Debraj Ray estimates that in India, more than 2m women are missing in a given year. The economists found that roughly 12% of the missing women disappear at birth, 25% die in childhood, 18% at the reproductive ages, and 45% at older ages. They found that women died more from "injuries" in a given year than while giving birth - injuries, they say, "appear to be indicator of violence against women". Deaths from fire-related incidents, they say, are a major cause - each year more than 100,000 women are killed by fires in India. The researchers say many cases could be linked to demands over a dowry leading to women being set on fire... These findings point to life-long neglect of women in India. It also proves that a strong preference for sons over daughters - leading to sex selective abortions - is just part of the story. Analysts say deep-rooted changes in social attitudes are needed to make India's women more accepted and secure. There is deeply entrenched patriarchy and widespread misogyny in vast swathes of the country, especially in the north." See *How India Treats its Women*, BBC News India, <http://www.bbc.com/news/world-asia-india-20863860> (2/6/2014).

⁶⁰ Maldonado, D. B. (2013). *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*: Cambridge University Press., p.1.

notion of human value and respect predates western civilization as well as the popular Kantian concept of human dignity and also offers a superior indigenous platform for its protection.⁶¹

By the classical judicial interpretation of Article 21 of the Indian Constitution, *dignity* means “life and personal liberty,” that is, the minimum conditions which must exist to enable a person live a free and dignified life.⁶²

Human dignity is inherent, divine, basic and timeless and should glaringly apply to all persons in all nations regardless of sex, race, fraternity, political affiliation, social status or religious creed. It is universal in nature and attaches to a person because he is *human*. The authors opine that vulnerable persons such as women and those in the small and hidden places⁶³ deserve more dignity so as not to leave the least impression of a *diminished personhood* or a *less-than-human being* status. The Declaration of the 1993 UN World Conference on Human Rights, Vienna states that ‘*the human rights of women and of the girl-child are an inalienable, integral and indivisible part of human rights.*’ Similarly, by the combination of Articles 1 and 5 of the Universal Declaration of Human Rights (UDHR), ‘all human beings are born free and equal in dignity and rights’ and ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ CEDAW considers dignity of women as the elimination of “prejudices” and practices based on assumptions about the inferiority or superiority of either sex.⁶⁴

⁶¹ Casmir, K. A., Ome, E., & Nwankwo, A. (2014). Re-Examination of Igbo Values System, and the Igbo Personality: A Kantian and African Comparative Perspective. *Open Journal of Philosophy*, 4(03), 397. These authors concluded that “the Igbo communal system has the best indigenous ethical and environmental structure for the restoration of man’s dignity as posited by Kant and, has, for ages before Kant, been at the forefront of this restoration, ethicalization and construction of values for human dignity.” Their paper however, was not particular to women nor did it examine the legal framework for the protection of the dignity of women in Nigeria, India or South Africa.”

⁶² *Bandhua Mukti Morcha v. Union of India*, AIR 1984 802.

⁶³ Uju Peace Okeke, “A Case for the Enforcement of Women’s Rights as Human Rights in Nigeria” (**The Women’s UN Report Program & Network (WUNRN)**). http://www.wunrn.com/news/2010/04_10/04_05_10/040510_nigeria.htm (12/7/2014).

⁶⁴ CEDAW Article 5.

In *State v. Makwanyane*,⁶⁵ the South African Constitutional Court described *dignity* as “the foundation” of other human rights. Desmond Tutu argues that freedom, justice and peace in the world are founded on the recognition of the inherent dignity of all members of the human family, and of their equal and inalienable rights.⁶⁶ This is the basic spirit of *Ubuntu*.⁶⁷

Article 4 of the African Charter on Human and Peoples’ Rights 1981 states that: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person.”

This provision underscores the fact that the right to dignity ought to attach to ‘every human being’ to the extent of the ‘respect for his life’ and the ‘integrity of his person.’

In the words of Oscar Schachter, “[r]espect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others.”⁶⁸

This restates the inviolable fact that human dignity is a universal attribute and therefore, every socio-cultural prejudice or sexual abuse of women is a clear breach of their right to dignity and self-worth as *human beings*.⁶⁹

1.9.1.1 Common Forms of Abuse of Women’s Dignity

Most violations of the right to dignity of women in Nigeria, India and South Africa hinges on patriarchy, native law and custom or socio-religious mythology.⁷⁰

⁶⁵ 1995 (3) SA 391 (CC) South African Constitutional Court. (also cited in Uju Peace Okeke, op. cit.)

⁶⁶ Iyassu Menelik, G. Y. (2014). The Issue of Human Rights In Africa. *Africa University (Institute of Peace and Governance), Mutare Zimbabwe.*, 8.

⁶⁷ “Ubuntu” meaning unity, human dignity and respect amidst national diversity. See Extra-curial speeches by L.W.H. Ackermann ‘Equality and the South African Constitution: The Role of Dignity’ Brain Fischer Lecture delivered at Rhodes House, Oxford on 26 May 2000, published in *S. Afr. J. on Hum. Rts.*, 22, 597-612.) and Chaskalson P (A Chaskalson ‘Dignity as a Foundational Value in the South African Constitution’ Third Brain Fischer Lecture delivered on 18 May 2000 at the Civic Centre, Johannesburg, since published in (2000) **16 SAJHR** 193). See also the observation of O’Regan J in the celebrated case of *S v Makwanyane* 1995 (3) SA 391 (CC).

⁶⁸ ‘Human Dignity as a Normative Concept’ (1983) 77 *American J of int L* 848-54.

⁶⁹ Margaret Platiner, “The Status of Women under international Human Rights Law and the 1995 UN World Conference on Women, Beijing, China” 84 *Kentucky Law Journal* (1995-1996), 1249. http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/kentlj84§ion=45, (14/7/2014).

⁷⁰ Durojaye, E. (2013). ‘Woman, but not human’: Widowhood practices and Human Rights Violations in Nigeria. *International Journal of Law, Policy and the Family*, 27(2), 176-196.

In India, the commonest forms include rape,⁷¹ forced labour,⁷² dowry-related violence/murder,⁷³ *Sati*, (self-immolation),⁷⁴ sex selection and son preference which often lead to the abuse/killing of girls or the abortion of female foetuses. In South Africa, apart from sexual violence and rape,⁷⁵ certain crimes and murders like intimate *femicide* (murder by a male partner, boyfriend or husband.), sexual serial killing, rape-murders and witch burnings have also been linked to patriarchy, domestic violence and exploitation of women.⁷⁶

In Nigeria the commonest violations of the dignity of women are also rooted in native law and custom, patriarchy and socio-religious mythology, and includes traditional widowhood rites, female genital mutilation/cutting (FGM/C), forced child marriages,⁷⁷ wife beating, wife *confinement*,⁷⁸ wife donation,⁷⁹ widow inheritance,⁸⁰ son preference (which triggers psychological violence, mental torture,⁸¹ polygamy and wife abandonment), denial of inheritance and proprietary rights,⁸² and *chattelization* of women and girls, consequent upon the compulsion to pay dowry for customary law marriages which usually takes place before the parents of the girl would permit or subscribe to her celebrating an Act marriage, particularly in Eastern Nigeria.

⁷¹ BBC News India of 29 May 2014 reported the case of two teenage girls found hanging from a tree in a village in the northern Indian state of Uttar Pradesh after they had been gang raped. This is in spite of recent legislation providing stiffer penalties for rape and allied sexual offences in the Criminal Law (Amendment) Act 2013. <http://www.bbc.com/news/world-asia-india-27615590> (2/6/2014).

⁷² Reports show that thousands of young women work in exploitative and dehumanizing bonded labour conditions in garment factories. See Centre for Research on Multinational Corporations (SOMO) and the India Committee of the Netherlands (ICN) titled "Maid in India: Young Dalit Women Continue to Suffer Exploitative Conditions in India's Garment Industry." (http://somo.nl/publications-en/Publication_3783, accessed on 14/4/2013).

⁷³ An Indian woman may suffer dowry-related violence/death if her in-laws consider the "groom's price" paid by her family as inadequate. Glyn, *Bride Price African Pride or Prejudice?* <http://www.feelfreenetwork.org/index.php/bride-price>, (26/5/2013); Tambiah, S. J., Goheen, M., Gottlieb, A., Guyer, J. L., Olson, E. A., Piot, C., ... & Vuyk, T. (1989). Bridewealth and dowry revisited: The position of women in Sub-Saharan Africa and North India [and comments and reply]. *Current Anthropology*, 413-435.

⁷⁴ The Free Merriam-Webster Dictionary defines "immolate" as "to kill or destroy (someone or something) by fire"; "to offer in sacrifice; to kill as a sacrificial victim" "to kill or destroy often by fire." <http://www.merriam-webster.com/dictionary/immolate>. This custom was officially abolished in India in 1829.

⁷⁵ Chamuka Takura, 17 August 2011, "The SADC Gender Protocol: Are the 2015 Objectives Achievable?" Ngo Pulse. Cited in Gemma Hancox (October 25th, 2012) Marital Rape in South Africa: Enough is enough, **BUWA!** A Journal on African Women's Experiences, 70-74, p.73 <http://www.osisa.org/buwa/south-africa/marital-rape-south-africa> (13/10/2013).

⁷⁶ VIOLENCE AGAINST WOMEN IN SOUTH AFRICA: A RESOURCE FOR JOURNALISTS, Soul City Institute of Health and Development Communication, Soul City, 1999 p.5.

⁷⁷ Young or teenage girls are sometimes compelled to marry rich men or other men against their will, so as to help raise money to pay off a debt or to train their brothers in school or other vocation.

⁷⁸ Islamic law in Nigeria permit women to be kept in *purdah* (house arrest) and shielded away from the public or stranger.

⁷⁹ In parts of Kogi state, custom permits a man to *donate* his wife to sleep with an august visitor to show total hospitality.

⁸⁰ Certain Ibo custom permits a widow to be inherited as "wife" by his stepson or any of his deceased husband's brothers.

⁸¹ Spousal rape is not an offence in Nigeria because Section 6 of the Nigerian Criminal Code defines *unlawful carnal knowledge* as "carnal connection which takes place otherwise between husband and wife."

⁸² *Akinnubi v. Akinnubi* (1997) 46 LRCN 137, *Contra Nnayelugo v Nnayelugo* (2008) All FWLR Pt 401 p.97.

The typical Nigerian society also recognizes a man as head of the family by reason of which he may *dominate*, threaten, beat up or even rape his wife or cohabiting partner because she is *his property* whereas it is a taboo for a woman to beat her husband.⁸³ And regrettably, marital rape is not a crime in Nigeria.⁸⁴ The man is also the presumed breadwinner, even if the woman's income actually runs the family⁸⁵ because certain Nigerian customary practices affirm the socio-cultural norm that a woman does not enjoy any independent personality but is always considered an appendage of a father or mother, and this suggests why women do not enjoy succession to the estate of their deceased husbands or fathers but are rather considered as part of the estate to be inherited by the men.⁸⁶

Native custom in parts of Cross River State, Nigeria, require a woman who has still birth to trek to an evil forest where her hair and pubic area must be cleanly shaved as sacrifice to appease the gods and cleanse her *sacrilege*.⁸⁷ Certain Nigerian mythology consider women as witches,⁸⁸ or *unclean* and *subordinate* and, therefore, must not eat chicken rump, or take yam tubers off the stakes in the yam barn, or even shake hands with a man but rather to stoop down, kneel down or bend down low to greet him.⁸⁹ In some cultures a widow is compelled to drink the bath water of her husband's corpse before his burial as "oath" that she had no hand in his death. Indignity may also include verbal and emotional torture or the use of abusive and humiliating language, and sometimes innuendoes on a woman by her husband, mother in-law and even

⁸³ Olong Mathew Adefi. (2009) "Cultural Practices and Traditional Beliefs as Impediments to the Enjoyment of Women's Rights in Nigeria." *Journal of Contemporary Legal Issues* JCLI Vol. 1, No. 1 (A publication of the Nigerian Bar Association, Idah branch, Kogi State, Nigeria) p.117-131.

⁸⁴ Section 357 of the Criminal Code Act Cap 77, Laws of the Federation of Nigeria, 1990 (applicable in the Southern part of Nigeria) defines rape as unlawful carnal knowledge of a woman or girl by *any person* without her consent, or with her consent, if it was obtained unlawfully. But Section 6 of the same Code defines unlawful carnal knowledge as "carnal connection which takes place otherwise than between husband and wife."

⁸⁵ Olong Mathew Adefi (2009). 'Cultural Practices and Traditional Beliefs as Impediments to the Enjoyment of Women's Rights in Nigeria', *ibid* at p. 130.

⁸⁶ Morolake Omonubi-McDonnell; *Gender Inequality in Nigeria* (2003) Spectrum Books Ltd, p.130

⁸⁷ Akpo Offiong Bassey. (1995), *Religion, Culture and tradition in Cross River State* in Discrimination, Religion and Culture: A Theoretical Approach- Eliminating Discrimination Against Women- Constitutional Rights Project, pp 24-25.

⁸⁸ Emile Secker, "Witchcraft stigmatization in Nigeria: Challenges and successes in the implementation of child rights" *International Social Work* (2012) 56(1) 22-36.

⁸⁹ Ojilere, Aloy (2008). "The Customary Law and Socio-religious Mythology on the Rights of Women in Nigeria." *Nigerian Journal of Public Law* (NJPL) Vol.1 No. 1 Faculty of Law, University of Nigeria, Enugu campus. 257-266.

extended family members, especially if she is childless or has only female children.⁹⁰ It is therefore no secret that despite commitments to international and regional human rights treaties and conventions, women and girls are still devalued and humiliated in Nigeria.⁹¹

Some Christian authors even contend that the discrimination against women has its roots from the Biblical account of creation where the woman was fashioned out of man's single rib.⁹²

Worse still, at least one author has opined that Nigerian women have become classified into the same vulnerable group as aliens, ethnic, linguistic and religious minorities, persons born out of wedlock, children, the disabled and the mentally retarded who are most likely to be abused and denied their fundamental rights.⁹³ One therefore wonders whether women are not indeed *human*.⁹⁴

However, this thesis does not propagate the view or suggest that all cultural practices demean women's integrity rather that cultural differences are to be respected, but only within limits. Also, that cultural difference does not justify assaults on the bodily integrity of vulnerable people or the blind application of practices which harm or violate the dignity of women particularly⁹⁵.

⁹⁰ Ojilere, Aloy (2009). "Domestic Violence and the Law in Nigeria." *CWGS- Journal of Gender Studies* Vol. 1 No.4 Centre for Women and Gender Studies, Imo State University, Owerri. 75-87.

⁹¹ Sani Mustapha Kura, "An analysis of Gender inequality and National Gender Policy in Nigeria" *International Journal of Scientific & Engineering Research* Volume 4, Issue 1, January 2013, p.8 ISSN 2229-5518 IJSER © 2013 <http://www.ijser.org>. (24/7/2014).

⁹² Ushe, U. M. (2015). Eradicating Sexual Abuse And Gender Based Violence In Africa And America: Role Of Religious Leaders. *European Scientific Journal*, 11(5), 99-116 at 104.

⁹³ A.A. Idowu (2013). "Women's Rights, Violence and Gender Discrimination-The Nigerian Circumstances." In Ronke Iyabowale Ako-Nai (ed.) *Gender and Power Relations in Nigeria*, Lexington Books, Plymouth, U.K., p. 31-45 esp p. 32; Gasioukwu, M.O.U (2003) *Human rights: History, Ideology and Law*. Jos, Nigeria: Fab educational Books, p.140.

⁹⁴ Durojaye, E. (2013). 'Woman, but not human': Widowhood practices and Human Rights Violations in Nigeria. *International Journal of Law, Policy and the Family*, 27(2), 176-196.

⁹⁵ Merry, S. E. (2003). Constructing a Global Law-Violence against Women and the Human Rights System. *Law & Social Inquiry*, 28(4), 941-977 at 946. The 1993 UN Declaration on the Elimination of Violence against Women (DEVAW) also obliges states to condemn violence against women and not to invoke custom, religion, or culture to limit their obligations of guaranteeing the rights of women.

1.9.2 Sustainable

The New Shorter Oxford English Dictionary⁹⁶ defines “sustainable” to mean *inter alia*, *able to be upheld and defended* while the Merriam-Webster’s online dictionary defines it as *able to last or continue for a long time*.⁹⁷ “Sustainability” is now commonly used as the yardstick to describe standard circumstances applicable to other areas of national, political, social, economic or agricultural development. For instance, renowned professor of sustainable development, Jeffery Sachs emphasised the importance of sustainability (and in the case of this thesis, a sustainable legal framework) thus:

As a method of helping to save the world, sustainable development encourages a holistic approach to human well-being, one that includes economic progress, strong social bonds, and environmental sustainability... I predict that sustainable development will become the organizing principle for our politics, economics, and even ethics in the years ahead. Indeed, the world’s governments have agreed to place it at the very center of the world’s post-2015 development agenda. They will soon adopt Sustainable Development Goals (SDGs), which will help guide the world to a safer and fairer twenty-first-century trajectory.⁹⁸

In his co-authored paper, *The United Nations in the Age of Sustainable Development*, the learned author further wrote that:

Achieving sustainable development will be the over-riding challenge of this century. Throughout most of history, the challenges of integrating economic development, social inclusion, and environmental sustainability were local or regional. In the 21st century, however, they are indisputably global. Only through global cooperation can individual nations overcome the

⁹⁶ The New Shorter Oxford English Dictionary- The New Authority on the English Language (Edited by Lesley Brown) vol. 2 (N-Z), 1993 Clarendon Press, Oxford, p.3163.

⁹⁷ <http://www.merriam-webster.com/dictionary/sustainable>. (11/7/2015).

⁹⁸ Sachs, J. D. (2015). *The age of sustainable development*: Columbia University Press.

interconnected crises of extreme poverty, economic instability, social inequality, and environmental degradation.’⁹⁹

It therefore follows, that a *sustainable* legal framework for the protection of women’s right to dignity in Nigeria and elsewhere, is one which can endure for a long time without becoming easily obsolete, and of course, this is the ultimate desire of the United Nations. This thesis contends that this is most realistically achievable in Nigeria by judicial creativity and activism, even amidst defective or absent constitutional, legislative or policy provisions. Suffice to say, that the advantage of justiciability of both fundamental rights and socio-economic rights (which being directive principles, are declared non-justiciable in the Constitutions of Nigeria and India) in the South African Bill of Rights may well be considered an addendum if the advances in judicial creativity and activism in India are effectively applied.

1.9.3 Globalization (or Globalisation)

Simply put, *globalization* means “to make global” or “sustainable” or “become part of the global” or “integrate or transform into the global”. It implies a national integration with the rest of the world in the application of *best practices*.

The Calgary Board of Education, Media Services, 2005, rightly described globalization as “the process of making something worldwide in scope or application,”¹⁰⁰ while Swedish journalist, Thomas Larsson, wrote that it is “the process of world shrinkage, of distances getting shorter, things moving closer.”¹⁰¹

⁹⁹ Jeremić, V., & Sachs, J. D. (2014). The United Nations in the age of sustainable development. *The Economic and Social Review*, 45(2, Summer), 161-188, at 161.

¹⁰⁰ See <http://schools.cbe.ab.ca/logistics/g.html>. (17/6/2015).

¹⁰¹ T. Larsson, *The Race to the Top: The Real Story of Globalization* (U.S.: Cato Institute, 2001), p. 9, 4, cited at p. 3 of Al-Rodhan, N. R., & Stoudmann, G. (2006). Definitions of globalization: A comprehensive overview and a proposed definition, p. 1-21. Available at: http://www.wh.agh.edu.pl/other/materialy/678_2015_04_21_22_04_13_Definitions%20of%20Globalization_A%20Comprehensive%20Overview%20and%20a%20Proposed%20Definition.pdf. (17/6/2015).

In this thesis therefore, “globalization of women’s right to dignity” would also refer to the process of *internationalizing* and *making sustainable* the legal framework for the protection of women’s right to dignity in Nigeria, that is, the process of reforming and sustaining the Nigerian legal system to conform to core standard of international law. This will entail the raising of Nigeria’s constitutional provisions, law and policy, as well as judicial attitude for the protection of the dignity of women to *international standard*. Globalization usually arises from the exchange of world views on acceptable international best practices.

1.9.4 Social Equality and Exclusion¹⁰²

The World Bank describes ‘equality’ in terms of *Social equity*, otherwise defined as *equity in rights, resources and voice*, that is, ‘equal access to the opportunities that allow people (in this case, women and girls) to pursue a life of their own choosing and avoid extreme deprivations in outcomes.’ According to IMF, ‘Equality of rights refers to equality under the law, whether customary or statutory. Equality of resources refers to equality of opportunity, including equality of access to human capital investments and other productive resources and to markets. Equality of voice captures the ability to influence and contribute to the political discourse and the development process.’ The absence or denial of social equity invariably drifts victims to ‘social exclusion,’ a concept which makes one vulnerable as an *outsider*, that is, a process which systematically disadvantages a certain group by discriminating against them on the basis of gender, ethnicity, religion, caste, disability, cultural environment or other circumstance, which may include widowhood.¹⁰³

¹⁰² For detailed expose of this subject, See N. J. Johnson & J. H. Svara (Eds.), *Justice for All: Promoting Social Equity in Public Administration* (2015). New York, USA: Routledge.

¹⁰³ The World Bank and IMF reports were culled from Buss, T. F., & Ahmed, U. (2015). Social Equity and Development. In N. J. Johnson & J. H. Svara (Eds.), *Justice for All: Promoting Social Equity in Public Administration* (pp. 56-75). New York, USA: Routledge, esp. p. 56-57.

1.9.5 Sexual Violence

In 2002, the World Health Organization, in its World Report on Violence and Health defined sexual violence as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.”¹⁰⁴

1.9.6 Violence Against Women

“Violence against women” has been defined in Article 1 of the UN Declaration on the Elimination of Violence Against Women, (DEVAW) 1993 to mean “any act of gender-based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”

When this violence is perpetrated by a spouse, a family member, or otherwise at home, it is described as *domestic violence*. It includes Intimate Partner Violence (IPV) which leads to other violations of human rights of the victim as an individual. It violates the right to live with human dignity and identity and amounts to a denial of the right to equality which is a compound universal right. Therefore, the inability of the state to recognize and criminalize such offence is a further denial of the right to equal protection of the law in international law.¹⁰⁵

1.9.7 Patriarchy

Patriarchy is the common notion of seeing the world and perceiving virtually everything from the point of view of “inequality” of men and women, and “man” as the head and

¹⁰⁴ Badjena, S. S. (2014). Sexual Violence against Women with Disabilities and the Legislative Measures in India. *ODISHA REVIEW* (April-May 2014), 46-57.

¹⁰⁵ Ambily, P. (2014). Evaluating the Criminal Justice Interventions for ‘Intimate Partner Violence’ in India: The Need for a Paradigm Shift. *SPCERA International Journal of Law and Governance*, (SPCERA IJLG), 3(6), 32-42. doi: <http://spcera.in/pdf/4Amly-Criminal%20justice%20and%20interventions-%20Ambily.pdf>.

decision maker who must lead and be obeyed by women. It promotes the popular myth that women are inferior to men and creates an almost natural bias against women in virtually every sphere of human activity, whether socio-political, religious, cultural or economic.

Generally, Patriarchy has been defined as a system of social relations in which men as a category have power over women as a category; where men are regarded as superior and women regarded as inferior; where decisions and everything else in society are defined according to male interests and concerns without consideration for women¹⁰⁶ and this is a common denominator in Nigeria, India and South Africa.¹⁰⁷ Therefore, such customary beliefs as “son preference” and “wife ownership” which often necessitates certain humiliating practices and the violation of the right to dignity of women are rooted in patriarchy.¹⁰⁸

1.9.8 Judicial Activism

The judiciary in India and South Africa are generally considered as independent, fearless and with the ability to cause transformative constitutional and socio-political consequences. The Indian Supreme Court is particularly famous for its innovative and broad interpretation of constitutional provisions especially in relation to fundamental rights and the non-justiciable directive principles of state policy in the Indian

¹⁰⁶ See Women in Nigeria (WIN) Document, 1985, cited in Ozo-Eson, P. I. (2008), "Law, Women and Health in Nigeria." *Journal of International Women's Studies* 9(3) at 287. The author however mentioned that “in contemporary Nigeria, women are beginning to occupy their rightful places. Women are beginning to be found in professions previously dominated by men such as law, medicine, lecturing and so on. Also, women have moved into important positions in both government and the private sector. This notwithstanding, there is a lot more to be done concerning the liberation and empowerment of women in Nigeria.”

¹⁰⁷ Reed, H. (2014, July). Race and Patriarchy: Gender and Migration in South Africa During and after Apartheid. In *XVIII ISA World Congress of Sociology (July 13-19, 2014)*. Isaconf; Kanu, I. A. (2014). An Enquiry into the Religio-Cultural Experience of Women in Nigeria: Towards a Philosophy of Reciprocity. *AFRREV LALIGENS: An International Journal of Language, Literature and Gender Studies*, 1(2), 50-60; Karandikar, S., Frost, C., & Gezinski, L. (2014). Patriarchy and Gender-Based Violence: Experiences of Female Sex Workers in India. *International Journal of Social Work*, 1(1), 1-14.

¹⁰⁸ Makama, G. A. (2013). Patriarchy and Gender Inequality in Nigeria: The Way Forward. *European Scientific Journal*, 9(17); Walton, A. D. (2013). Just men? Towards the education of men for gender justice in a context of religiously legitimised patriarchy: A South African case study. *International Journal of Educational Development*, 33(6), 604-611. doi: 10.1016/j.ijedudev.2013.05.001; Bhat, Z. A. (2014). Gender Bias and Socio-Economic Problems of Women in India. *Abhinav-National Monthly Refereed Journal of Research in Arts & Education (Online ISSN 2277-1182)*, 3(4), 8-13.

Constitution.¹⁰⁹ For instance, in *S.P. Gupta v. Union of India & Ors*¹¹⁰ and *Bandhua Mukti Morcha v. Union of India*¹¹¹ and contrary to popular practice, the Indian Supreme Court modified and extended the general rule of *Locus Standi* by inventing “Public Interest (or Social Action) Litigation” (PIL) whereby any member of the public having “sufficient interest” can approach the court to enforce the Constitutional or legal rights of another, or those who cannot approach the court because of their poverty, disability or a socially or economically disadvantageous position. Thus, a person need not come to the court personally or through a lawyer. He can simply write a letter directly to the court complaining his sufferings and the court will treat the letter as a proper *writ* petition.

Simply put, PIL “bring law into the service of the poor and oppressed. Under the banner of Public Interest (or Social Action) Litigation (PIL) and the enforcement of fundamental rights under the Constitution, the courts have sought to rebalance the distribution of legal resources, increase access to justice for the disadvantaged, and imbue formal legal guarantees with substantive and positive content.”¹¹²

In *Maneka Gandhi v. Union of India*,¹¹³ the Indian Supreme Court interpreted the right to life and personal liberty in Article 21 of the Indian Constitution to cover the guarantee of all other fundamental rights including the right to human dignity. It particularly interpreted the socioeconomic rights in the non-justiciable directive principles as impliedly justiciable because they constitute a bundle of rights without which the right to life and liberty, though sacrosanct, becomes unrealistic.

¹⁰⁹ Guruswamy, M., & Aspatwar, B. (2013). Access to Justice in India: The Jurisprudence (and Self-Perception) of the Supreme Court. In D. B. Maldonado (Ed.), *Constitutionalism of the Global South-The Activist Tribunals of India, South Africa, and Colombia* (pp. 329-360): Cambridge University Press.

¹¹⁰ AIR 1982 SC 149, especially per Bhagwati J, then CJI at 189.

¹¹¹ AIR 1984 SC 803.

¹¹² Cassels, J. (1989). Judicial Activism and Public Interest Litigation in India: Attempting the Impossible? *The American Journal of Comparative Law*, 495-519 at 497.

¹¹³ A.I.R 1978 SC P.597.

These forms of judicial interpretations are uncommon because they involve a deep-down definition of the law which stretches the protection of legal and fundamental rights to its farthest populist limit. This is what is known as *judicial activism* for which the judiciary in India is exalted.¹¹⁴

1.9.9 Judicial Pragmatism

Just as the judiciary and Supreme Court in India is known for its *activism*, the judiciary and Constitutional Court of South Africa is commended for its *pragmatism*. Heinz Klug uses this phrase to show that the Constitutional Court of South Africa operates a *higher* form of uncommon judicial activism arising from “the way in which the courts and judges have entered into national political life, and what difference their participation has made in the construction of Constitutional democracy in South Africa.”¹¹⁵ He defines pragmatism in terms of the fact that albeit the judiciary is the ‘least dangerous branch’ of government, ‘the Constitutional Court continues to play a central role in the legal system’ and still keeps its legitimacy and authority amidst the ‘political tension that are inevitable in a country facing enormous social, political and economic challenges that have not left the judicial system unaffected.’¹¹⁶ For instance, in the case of *F (Applicant) v. Minister of Safety and Security & 5 Ors*,¹¹⁷ a policeman on standby duty had offered a ride to a lady in a police car and had later raped her on the way. The Police tried to abdicate responsibility for the violation of the woman’s right to dignity by arguing that the police officer was actually on a frolic of his own because he was not on duty when the act was committed. The Constitutional Court rejected this argument

¹¹⁴ Mate, M. (2013). Public Interest Litigation and the Transformation of the Supreme Court of India. In D. Kapiszewski, G. Silverstein & R. A. Kagan (Eds.), *Consequential Courts: Judicial Roles in Global Perspective* (pp. 262-268). New York, USA: Cambridge University Press; Babu, S. R. (2013). Contribution of the Supreme Court to the Growth of Democracy in India. *NUJS LAW REVIEW*, *NUJS L. Rev.* 6.; Ghosh, P. (2013). Judicial Activism and Public Interest Litigation in India. Available at SSRN 2285517; Bhagwati, P. (1992). The role of the judiciary in the democratic process: Balancing activism and judicial restraint. *Commonwealth Law Bulletin*, 18(4), 1262-1267.

¹¹⁵ Klug, H. (2013). Constitutional Authority and Judicial Pragmatism, Politics and Law in the Evolution of South Africa’s Constitutional Court *Consequential Courts: Judicial Roles in Global Perspective* (pp. 93-113). New York, USA: Cambridge University Press, at 93.

¹¹⁶ *Ibid* at 94.

¹¹⁷ CCT 30/11 [2011] ZACC 37 (Heard on 4 Aug 2011, Decided on 15 Dec 2011).

and held the state was vicariously liable for the violation because the police officer wore police uniform at the time, had police badge, held himself out as a police officer, and also drove in a police car, as a result of which the victim had trusted her.

Again, in *State v. Makwanyane & Anor*,¹¹⁸ the Constitutional Court held that death penalty was a form of inhuman and degrading punishment which breached the right to human dignity and therefore unconstitutional because the right to life is considered sacred for everyone and the state is obliged to protect it, even in respect of the most violent criminal. This is the South African spirit of *Ubuntu*: unity, dignity and respect for all in spite of national diversity.

In this thesis the researcher will make no distinction in the use of the words, *activism* or *pragmatism* or *creativity* in defining the judicial advances of the Indian Supreme Court or South African Constitutional Court because all the three phrases point to the same direction, namely, the just, fair and reasonable interpretation of the law to guarantee protection of women's right to dignity and fundamental rights generally.

1.9.10 Legisprudence

The traditional role of the judiciary in nearly all Constitutions including those of Nigeria, India and South Africa is to interpret the law. The legislature is the law-making organ of government while the executive performs regular executive functions. This is the primary basis of separation of powers. The constitutional role of the judiciary includes the review of the legislation, functions and policies of the other organs of government as well as administrative functionaries.

However, in the course of interpreting the law, the judiciary is sometimes faced with the confusion of what appropriate step to take in the event that legislation is defective or non-existent, as was in the popular Indian cases of *Vishaka & Ors v. State of Rajasthan*

¹¹⁸ [1995] ZACC 3; 1995 (3) SA 391 (CC).

& Ors¹¹⁹ and *Sheela Barse v. Union of India*.¹²⁰ In both cases, the Supreme Court of India had to formulate and set new guidelines which applied and were binding as law in the absence of a formal legislation made by the legislature. The judiciary may even *un-make* laws by setting them aside and declaring them unconstitutional, null and void. This bold activist initiative of judicial law-making and un-making is what Yaniv Roznai calls *Legisprudence*, that is, the power of courts to “make laws.”¹²¹ This thesis humbly describes it by the synonymous phrase: *Judislative*, that is, the “legislative” power of the judiciary.

1.9.11 The Global South

This phrase was formulated by Daniel Bonilla Maldonado and is used to describe “developing countries” as distinguished from “developed countries” (the Global North). According to the author,

In this hierarchy, the scholarship and legal products created by the Global South occupy particularly low level. It is extraordinary to hear the name of a scholar or a legal institution from the Global south in this dialogue. The jurisprudence of a Global South court is very seldom mentioned by the specialized literature when discussing the meaning of key concepts in modern constitutionalism. It is very rare to see a course on comparative constitutional law in a North American or Western European university that includes a section about the constitutional law of a country in the Global South.¹²²

¹¹⁹ JT 1997 (7) SC 384; AIR 1997 SC 3011.

¹²⁰ AIR 1987 (1) 153.

¹²¹ Roznai, Y. (2014). *Legisprudence Limitations on Constitutional Amendments? Reflections on The Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act (April 10, 2014)*, 8(1), 29-57.

¹²² Maldonado, D. B. (2013). *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*: Cambridge University Press, p.5. The author however stated at pp. 18-19 that these examples are “purely declarative” and “simply illustrate the general argument. They are not meant to weigh and evaluate the totality of legal academia in the Global North and South. They are only intended to demonstrate the weakness of the argument that homogenizes legal academia in the Global South at a low level and the academia of the Global North at a higher one.”

It is therefore, on this note, that the researcher joins issues with the author in commending the judicial activism and Constitutionalism in India and South Africa because ‘the jurisprudence of the South African Constitutional Court on the use of comparative and international law for interpreting the South African Constitution and the Indian Supreme Court’s public interest litigation movement are two other examples of innovative legal products created in the Global South.’¹²³

1.9.12 Consequential Courts

In the words of Daniel Bonilla Maldonado,¹²⁴ ‘the Indian Supreme Court, the South African Constitutional Court, and the Colombian Constitutional Court have been among the most important and creative courts in the Global South. In Asia, Africa, and Latin America, these courts are widely seen as activist tribunals that have contributed (or attempted to contribute) to the structural transformation of the public and private spheres of their countries. The decisions of these three courts are gradually creating what can be called a constitutionalism of the Global South.’ The independence and effectiveness of these courts and those of their like in the United States ensure the judges’ willingness to respond to citizens’ quest for more assertive rulings, as well as political leaders’ tolerance for these rulings even when they upset existing legislation or government policy and necessitate drastic constitutional, structural and socio-political changes. In the light of these far-reaching activist and innovative judges’ roles including their power of *legisprudence*, interpretative power with regards to fundamental rights, access to justice and enforcement of socioeconomic rights etc. The trio of Kapiszewski, Silverstein and Kagan, therefore rightly describes them as “Consequential Courts.”¹²⁵

¹²³ *Ibid* at 18.

¹²⁴ Maldonado, D. B. (2013). *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*: Cambridge University Press.

¹²⁵ Kapiszewski, D., Silverstein, G., & Kagan, R. A. (2013). *Consequential Courts- Judicial Roles in Global Perspective*. New York, USA: Cambridge University Press. (See particularly the INTRODUCTION, pp 1-41).

1.10 Structure of the Thesis

The thesis is structured in six chapters.

Chapter One is the introduction of the thesis which contains such preliminaries as the background of the research, methodology of the research, the research objectives, the research questions, significance of the study, justification of the jurisdictions of the research and literature review. It also explains the meanings and implications of certain concepts fundamental to this thesis, namely, *human dignity*, *violence against women*, *sexual violence*, *judicial activism*, *judicial pragmatism*, *consequential courts*, *patriarchy*, *“legisprudence”*, and *The Global South*. It also contains examples of common violations to the dignity of women in Nigeria, India and South Africa.

Chapter Two examines the international framework for the protection of women’s right to dignity. These comprise basic UN covenants, instruments and Thematic Documents, as well as the African regional mechanism, particularly the African Charter on Human and People’s Rights and its relevant protocols which apply to Nigeria and South Africa only, as no similar regional framework applies to India.¹²⁶ It also examines the substantive obligation of states in international law as well as relevant critique of the international framework for the protection of women’s right to dignity, and the way forward.

Chapter Three explores the constitutional framework for the right to dignity of women in Nigeria, India and South Africa. It also makes a critique of each of the national frameworks and suggests the way forward.

Chapter Four explores the legislative and policy framework for the protection of the right to dignity of women in the three jurisdictions of study including a critique of each of the national frameworks as well as the way forward.

¹²⁶ Asia is the only continent without a regional human rights mechanism and therefore India is not bound by any regional framework.

Chapter Five recapitulates the fundamental gaps in the existing legal framework for the protection of the right to dignity of women in Nigeria, and the core advances in the framework of India and South Africa which may serve as valuable lessons for Nigeria.

Chapter Six is the summary, recommendations and conclusion. In this chapter, the researcher makes recommendations, based on the lessons from India and South Africa, for bridging the gaps and reforming the existing framework for the protection of women's right to dignity in Nigeria. It also identified major factors which may obstruct the implementation of these recommendations in Nigeria.

1.11 Literature Review

The right to human dignity, and indeed, the right to dignity of women is a living subject in domestic, regional and international law. Literature therefore abounds in various jurisdictions on the subject but not with collective reference to Nigeria, India and South Africa as this research seeks to do.

Literature for this research were drawn largely from human rights and constitutional law texts, national Constitutions, academic journal articles, scholarly legal and social literatures, media and research reports, reports and publications of relevant international agencies and non-governmental organizations, statutes and legal instruments, executive and legislative policies, opinion of stakeholders and academics, court judgments and legal thoughts of renowned jurists like Justice P.N. Bhagwati (Former Chief Justice of the Supreme Court of India) and Justice Dikgang Moseneke (Judge of the Constitutional Court of South Africa), on directive principles and fundamental rights generally.

Some of the literature includes:

The Constitutions of Nigeria,¹²⁷ India,¹²⁸ and South Africa¹²⁹ provides for the right to human dignity and respect. This right also avails women. However, the Economic, Social and Cultural [ESC] Rights which are necessary to guarantee a life with dignity are negative rights in Nigeria, implied rights in India and positive rights in South Africa.¹³⁰

The Indian Constitution¹³¹ contains much wider and explicit fundamental rights provisions than the Nigerian Constitution because in addition to the right to life and personal liberty, it specifically contains cultural and educational rights which protect the interest of minorities, as well as the right to freedom from exploitation with regards to bonded (forced) labour and employment of children in hazardous work. The Indian Constitution lists some important rights as *Directive Principles of State Policy* which ordinarily places them outside the scope of enforceable *fundamental rights*. However, the judicial ingenuity and activism of some Indian judges including Justice P.N. Bhagwati, effectively cured this constitutional defect. For instance, he was convincing in his sound *ratio decidenda* in *Maneka Gandhi v. Union of India*¹³²; and *Vishaka & Others v. State of Rajasthan & Ors*¹³³ that the guarantee of right to life and personal liberty in Article 21 of the Indian Constitution¹³⁴ is plural in content, and by implication, inclusive of the rights listed in the directive principles of state policy, and must be accordingly interpreted to give impetus to the constitutional guarantees. He

¹²⁷ Sections 34 of the Constitution of the Federal Republic of Nigeria, 1999.

¹²⁸ Article 21 of the Constitution of India, 1950.

¹²⁹ Section 10 of the Constitution of South Africa, 1996.

¹³⁰ The Constitutions of India and Nigeria refer to these ESC Rights as *Fundamental Objectives and Directive Principles of State Policy* and are non-obligatory and non-justiciable especially by Section 6(6)(C) of the Nigerian Constitution. But in India, they are *implied* as justiciable rights by virtue of the judicial activism of the Supreme Court. In *S v. Makwanyane*, 1995 (3) SA 391 (CC), the South Africa Constitutional Court described *dignity* as “the foundation” of other human rights. And in South Africa, where a woman’s dignity is violated by way of domestic violence, and she is compelled to go as low as contracting hired killers to assassinate her abusive spouse, the court had taken cognizance of her abuse and violation as good reasons to mitigate her sentence (See *Ferreira & Ors v The State* (2004) JOL 13027 (SCA)). Similarly, in the Indian case of *Khedat Majdoor Chetna Sanghat v. State of M.P.*, AIR 1995 SC 31 the Supreme Court raised a poser to itself thus: “If dignity or honour vanishes what remains of life?”

¹³¹ The Constitution of India, 1950 (As modified up to the 1st December, 2007).

¹³² AIR 1978 SC 215.

¹³³ AIR 1997 SC 3011.

¹³⁴ This Article 21 is similar in content and can be read into the right to human dignity in Section 34 of the Nigerian Constitution.

described this as *reasonable, fair and just* interpretation which is essential for constitutional development and democratic growth and social justice.

Some of his other judgments¹³⁵ necessitated sustainable legal and policy concepts like *Public Interest Litigations (PIL)*, *The Vishaka Rules*, improved *Legal Aid* and *The Epistolary Jurisdiction of Courts* which promote women's dignity and enforcement of fundamental rights in India.

Renowned Indian author Sheeraz Latif A. Khan¹³⁶ did an incisive book on how Bhagwati's contributions have sustained fundamental rights, legal and social justice in India. This thesis builds strongly on those contributions in proposing recommendations for judicial creativity and activism on the part of the Nigerian judiciary for enhancing the protection of women's right to dignity and fundamental rights generally in the country.

According to Jordan Paust,¹³⁷ human dignity is an old concept of constitutionalism and difficult to define and that it is a dynamic 'symbol of demand for individual value and freedom, equality of dignity and worth', which is better described simply as "the dignity, honor and value of each person" as defined through time. This thesis agrees with this definition, but has applied it with particular reference to women and girls in Nigeria, India and South Africa.

Rex Glensy¹³⁸ describes human dignity as being 'grounded in a concept of autonomy that holds at its core a valued moral center that is equal for everyone (men and women).' This thesis, notes however, that the concept of "equality" of men and women is idealistic, though quite strange within the age-long belief in patriarchy and patriarchal mind-set common in most African and Asian societies, including Nigeria,

¹³⁵ See *Hussainara Khatoon v. Home Secretary, State of Bihar* AIR 1979 SC 1369; *MC Mehta-Ganga Water Pollution Case* (1987) 4 SCC 463; AIR 198 SC; *Air India v. Nergesh Meerza*, AIR 1981 SC 1829; *S P Gupta v. India*, AIR 1982 SC 149; *Bandhua Mukti Morcha (The Bonded Labour)* AIR 1984 SC 802; *Vishaka and others v. State of Rajasthan & Ors* (JT 1997 (7) SC 384); AIR 1997 SC 3011, *Khatri v. State of Bihar* AIR 1981 SC 928, strengthening the earlier judgment of Justice Krishna Iyer in *M.H. Hoscot v. State of Maharashtra* AIR 1978 SC 1548.

¹³⁶ Khan, S. L. A., (2001). *Justice Bhagwati on Fundamental Rights and Directive Principles*, 2001, Deep & Deep Publications PVT. Ltd, New Delhi, India.

¹³⁷ Paust, J. J. (1984). Human dignity as a constitutional right: A jurisprudentially based inquiry into criteria and content. *Howard LJ*, 27, 145.

¹³⁸ Glensy, R. D. (2011). Right to Dignity, *The. Colum. Hum. Rts. L. Rev.*, 43, 65.

India and South Africa, which consider women to be naturally inferior and subordinate to men.

Hon. Justice Gabriel Orjiako¹³⁹ convincingly traced the historical and philosophical basis for the indignity and exploitation of women globally to ancient Israel, the Holy Bible, the Quran and customary law. His paper also explored the forms of abuse of women's dignity which is of interest to this thesis, even though the aspect on the historical and philosophical basis for indignity and exploitation of women globally, falls outside the scope of the thesis.

Rafatu Abdul Hamid¹⁴⁰ examined Islam and cultural interferences in the lives of the Nigerian women and concluded that although Islam abhors obnoxious customary practices including son-preference, 'one of the major obstacles that has impeded the progress of man towards freedom and peace is that of the bondage to his tribal customs and traditions, some of which have continuously ignored the basic human rights of others.' Her paper did not understudy India or South Africa but certainly stressed the point held strongly by this thesis, that some violations of women's right to dignity in India, Nigeria and South Africa, are induced by socio-religious beliefs and practices.

Guy Carmi and Doron Shultziner¹⁴¹ expressed the view that human dignity became common in the constitution of most countries after World War II. This fact is underscored in Chapter two of this this which explores the international framework for the protection of women's right to dignity.

Khokan Kumar Bag and Piyal Basu Roy¹⁴² traced the "Changing face of women exploitation in India" from the 12th century when Ballal Sen was the ruler of Bengal. They also examined some of the causes of these exploitation and suggested remedies

¹³⁹ Paper delivered by Hon. Justice G.G.I. Orjiako (Rtd), then Chief Judge of Imo State in an opening address at a seminar on Discriminatory Laws And Practices Against Women In Nigeria held in Owerri in 1995; (Lagos: Constitutional Rights Project, 1995) at p.43.

¹⁴⁰ AbdulHamid, R. (2014). Islam and Cultural Interferences in the Lives of the Nigerian Women. *Research on Humanities and Social Sciences*, 4(17), 1-7.

¹⁴¹ Carmi, G. E., & Shultziner, D. (2013). "Dignitizing" Constitutions Worldwide: On the Proliferation of Human Dignity in National Constitutions. Available at: http://works.bepress.com/guy_carmi/6 (15/6/2015).

¹⁴² Bag, K. K., & Roy, P. B. (2012). Changing Face of women Exploitation in India. *International Journal of Social science Tomorrow*, 1(1), 1-6.

but their study did not include Nigeria and South Africa, nor did it centre on the legal framework for the protection of dignity of women in India, which is part of the crux of this thesis.

Casmir Ani, Emmanuel Ome and Ambrose Nwankwo, A.¹⁴³ examined the indigenous African concept of human value *vis-à-vis* the Kantian concept of human dignity and concluded that the Igbo communal system has the best indigenous ethical and environmental structure for the restoration of man's dignity but their paper however, was not particular to women nor did it examine the legal framework for the protection of the dignity of women in Nigeria, India or South Africa."

Interestingly, Philomena Ozo-Eson¹⁴⁴ emphasised "the need to re-examine both the customary and statutory laws to reflect justice, dignity and fair play for all members of the society irrespective of their gender." She advocated that the repeal of statutes and local customs which encourage men to dominate women and reduce women's dignity (for instance, a law that encourages men to correct their wives by flogging) can redress "the general assumption of women's inferiority and their subjugation to men."¹⁴⁵ From a sociological background, the paper rightly and resoundingly posited that law could be applied as an instrument of liberation and empowerment for the transformation of oppressive and exploitative social order, institutions, and ideologies that create and sustain gender-biases. The paper, however, conceded on the other hand, that in authoritarian and undemocratic societies, law could be used to maintain negative socio-cultural, legal or political *status quo* by the ruling class but that whatever interpretation is given to law, law cannot be ignored because of the vital role it plays in maintaining order in society.¹⁴⁶ Of course, her work was sociological and did not consider the dignity of women in Nigeria, India or South Africa from a legal view point, nor did it

¹⁴³ Casmir, K. A., Ome, E., & Nwankwo, A. (2014). Re-Examination of Igbo Values System, and the Igbo Personality: A Kantian and African Comparative Perspective. *Open Journal of Philosophy*, 4(03), 397.

¹⁴⁴ Ozo-Eson, P. I. (2008). "Law, Women and Health in Nigeria." *Journal of International Women's Studies* 9(3), p.285.

¹⁴⁵ *Ibid* at 286.

¹⁴⁶ *Ibid* at 286-287.

suggest what legal reforms or advances from the judicial creativity or otherwise, may be drawn from anywhere to transform Nigeria's legal framework for the protection of women's right to dignity, especially against sexual abuse.

Andrew Fagan¹⁴⁷ opines that human rights are inherent entitlements belonging to every person as a consequence of being human, universal legal guarantees, civil, political, economic, social and cultural, protect human values (freedom, equality, dignity), inherent to individuals and to some extent, groups, reflected in international norms and standards, and are legally binding on states.

Justice Bankole Thompson¹⁴⁸ contends that one of the two juristic realities of the interaction of international law and municipal law is 'the emergence in modern times of the notion of human dignity as a paramount norm or ideal in the regulation and conduct of human affairs with the promulgation of the UDHR in 1948.' This truism explains why this thesis contends that the sustainability of the legal framework for the protection of women's right to dignity in Nigeria or elsewhere can best be measured by its, or their compliance with international law.

According to Duncan French and Samuel Katja,¹⁴⁹ one of the greatest essence of international law is that it emphasises the enforcement of socio-economic rights and that the interpretation of international law 'may be able to resolve or at least reduce the challenges posed by existing fragmentised misunderstandings' in municipal law.

They further asserted that the United Nations 'is increasingly focused on emerging threats to the rule of law ... and the root causes of conflict, including economic and social justice issues, particularly since festering grievances based on violations of

¹⁴⁷ Fagan, A. (2006). Human Rights. The Internet Encyclopaedia of Philosophy.

¹⁴⁸ Thompson, J. B. (2015). Relationship Between International Law and Municipal Law: History, Theories, Status, and Related Aspects. In *Universal Jurisdiction: The Sierra Leone Profile* (pp. 15-27). TMC Asser Press.

¹⁴⁹ French, D., & Samuel, K. (2015). Transitional Justice in Times of "Exponential Change": Constructing Normative Frameworks Fit for Purpose—The Importance of General International Law *Current Issues in Transitional Justice* (pp. 185-208): Springer, at 166, citing the 2011 UN Report on "Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies"

economic and social rights are increasingly recognised for their potential to spark violent conflict' consequent upon which 'greater efforts are needed to ensure a unified approach to the rule of law.'¹⁵⁰ This thesis relies on this in analysing the significance of international law in the domestic human rights forum which is also embedded in this research.

Jeffrey D. Sachs¹⁵¹ emphasised the essence of “sustainability” as a standard tool for measuring compliance of economic, social, political, environmental and other forms of development with international template. Although his book considered sustainable development generally without specific reference to “sustainable legal framework”, it is however arguable that this “sustainability” tool may also be applied in measuring conformity of the Nigerian legal framework for the protection of women’s right to dignity with international law, especially as the author expressed optimism that sustainable development will become the organizing principle for politics, economics, and even ethics in the world’s post-2015 development agenda when they adopt the Sustainable Development Goals (SDGs).¹⁵² Since equality and empowerment of women and girls is Goal No. 5 of the Sustainable Development Goals (SDGs), this thesis is therefore contemporary as it significantly places Nigeria on the path to a safer and fairer twenty-first-century trajectory with respect to the quest for a sustainable legal framework for the protection of women’s right to dignity, thereby offering the country a second opportunity to pursue the challenges of MDGs No. 3 under SDGs No. 5.

¹⁵⁰ French, D., & Samuel, K. (2015), *ibid* at 166, citing the 2011 UN Report on “Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”

¹⁵¹ Sachs, J. D. (2015). *The age of sustainable development*: Columbia University Press.

¹⁵² Jeffrey Sachs had also emphasised earlier that the MDGs are remarkable because they set the initial framework, that is, “the historic and effective method of global mobilisation” which would eventually give rise to the formulation of the SDGs. (See Sachs, Jeffrey D. "From millennium development goals to sustainable development goals." *The Lancet* 379.9832 (2012): 2206-2211). In their joint paper, Jeremic Vuk and Jeffery Sachs rightly emphasised the importance of *sustainability* or *sustainable development* as a contemporary global subject which is also achievable by global co-operation among states. According to them, ‘achieving sustainable development will be the over-riding challenge of this century. Throughout most of history, the challenges of integrating economic development, social inclusion, and environmental sustainability were local or regional. In the 21st century, however, they are indisputably global. Only through global cooperation can individual nations overcome the interconnected crises of extreme poverty, economic instability, social inequality, and environmental degradation.’ (See Jeremić, V., & Sachs, J. D. (2014). The United Nations in the age of sustainable development. *The Economic and Social Review*, 45(2, Summer), 161-188 at 161).

Yonglong Lu, Nebojsa Nakicenovic, Martin Visbeck and Anne-Sophie Stevance,¹⁵³ contends that one of the most remarkable features of the SDGs is that they emphasis the role of science in sustainable development and place greater demand on the scientific community than did the Millennium Development Goals (MDGs), which they replace.¹⁵⁴ This underscores the recommendation in this thesis that socio-economic rights, including the right to education, be made justiciable in Nigeria either by constitutionalization or judicialization.

Miles Maftan¹⁵⁵ has described the practice by which “democratic” groups, organizations and states violate human dignity by “institutionalizing and utilizing mechanisms that constrain or fully forbid” the protection of civil and political freedom as ‘militant democracy’. Although his work was with respect to Eastern and Central Europe, it nonetheless underscores this researcher’s contention that the deliberate or pretentious lack of political will may constitute a challenge to the implementation of plausible suggestions for a sustainable framework for protecting women’s right to dignity in Nigeria.

Watts and Zimmerman¹⁵⁶ explains that the violation of the dignity of women is a global subject usually rooted in patriarchy. The forms of violations differ with societies and jurisdictions, but in which ever form or jurisdiction, these violations are synonymous to violence against women. According to the authors, the term *violence against women* includes geographically or culturally specific forms of abuse such as female genital mutilation, dowry deaths, acid throwing, and honour killings (the murder of women who have allegedly brought shame to their family), as well as forms of

¹⁵³ Lu, Y., Nakicenovic, N., Visbeck, M., & Stevance, A. S. (2015). Policy: Five priorities for the UN Sustainable Development Goals-Comment. *Nature*, 520(7548), 432-433.

¹⁵⁴ The assessment of SDGs, especially Goal No. 5 (on women and girls) will however constitute an area for future reseach since it was only launced on 25 September, 2015.

¹⁵⁵ Maftan, M. (2015). Dignity, Militant Democracy, and Defending the Democratic Order. In G. Pleyers & I. N. Sava (Eds.), *Social Movements in Central and Eastern Europe: A renewal of Protests and democracy* (pp. 119-138). Bucharest, Romania.: Editura Universitatii din Bucuresti. Available at http://www.unibuc.ro/prof/sava_i/docs/res/2015iunSocial_Movements_in_CEE_-_University_of_Bucharest_May_2015_Rev.pdf#page=119 (26/6/2015). The author also cited Loewenstein, Karl. “Militant Democracy and Fundamental Rights I”, *American Political Science Review*, Vol. 31, 1937.

¹⁵⁶ Watts, C., & Zimmerman, C. (2002). Violence against women: global scope and magnitude. *The Lancet*, 359(9313), 1232-1237.

violence that are prevalent worldwide such as domestic violence and rape. The authors rightly identified ‘spouses and partners, parents, other family members, neighbours, teachers, employers, policemen, soldiers, and other state employees’ as some of the “potential perpetrators.”¹⁵⁷ Merry¹⁵⁸ shares this view but ‘attributed at least part of the violence experienced by women to customary practices and to the personal laws of ethnic and religious communities.’ This thesis attributes these violations to patriarchy which creates a societal mind-set of women inferiority to men. It further confirms the contention of this thesis that beliefs in certain customary laws, socio-religious mythologies and ancient ancestrally inherited practices may threaten implementation of the recommendations made in this thesis.

Andrew Rosser,¹⁵⁹ in two of his latest papers stressed the importance of justiciable legal frameworks for the protection of human rights (JLFPHR) by seeking answers to the following questions: Do justiciable legal frameworks for the protection of human rights (JLFPHR) promote the realisation of human rights in “low quality democracies? If so, under what conditions? What do answers to these questions imply for activists’ strategies for promoting human rights? He contends that although rights agendas encounter serious socio-political and institutional obstacles in low quality democracies, JLFPHR is crucial to rights realisation because it creates the enabling platform for citizens to successfully use relevant Constitutional provisions to challenge most threats including government policies that undermined these rights by: (i) aiding political mobilisation by poor and vulnerable groups such as women’s groups, and their supporting NGOs and (ii) providing a legal basis for these groups to seek judicial redress for rights violations, especially if they have ‘access to support structures for

¹⁵⁷ *Ibid* at 1232.

¹⁵⁸ Merry, S. E. (2003). Constructing a Global Law-Violence against Women and the Human Rights System. *Law & Social Inquiry*, 28(4), 941-977, at 964.

¹⁵⁹ Rosser, A. (2015). Realising Rights in Low Quality Democracies: Instructive Asian Cases. *Asian Studies Review*, 39(2), 180-193; Rosser, A. (2015). Law and the realisation of human rights: Insights from Indonesia’s education sector. *Asian Studies Review*, 39(2), 194-212.

legal mobilisation (SSLMs)', that is, enough financial, technical and organisational know-how to sustain the litigation and (iii) they encountered judges sympathetic to their cause. The papers therefore concluded that judicial activism and SSLMs are important preconditions for JLFPHR to contribute to the realisation of human rights through courts, especially in climes where prospective litigants are poor and the cost of litigation is high. It also underscores the importance of political mobilisation in creating a broader political climate favourable to judicial activism and policy change.

However, while the arguments and conclusion in the papers are sound and correct, they are focused specifically on four "low quality democracies"¹⁶⁰ in Asia namely, Indonesia, Nepal, Malaysia and Timor Leste, as well as the right to education in Indonesia. They did not focus on Nigeria, India or South Africa, or the right of dignity of women in any of these countries, even though the arguments and conclusion contained in the papers may reasonably apply to other low quality democracies in Africa, including Nigeria.

Ambika Kohli¹⁶¹ made a sociological inquest on gang rapes and molestation cases in India and expressed the view that the dominance of patriarchy in Indian societies explains why some people, including public officials prefer to blame the victims of rape rather than the offenders. She rightly and ingeniously opined that media reporting of such victim-blames is in fact, an indirect justification, support, incitement and condonation of violence against women. In her words, 'the misrepresentation by officials of sexual violence against women and blaming of victims for their behaviour or mode of dress, not only encourages violence against women but justifies it... Media coverage of such responses can arguably be seen to create mores for women's

¹⁶⁰ Andrew Rosser, *op.cit* used this phrase to describes democracies in transition, especially in developing third world countries.

¹⁶¹ Kohli, A. (2012). Gang Rapes and Molestation Cases in India: Creating Mores for Eve-Teasing *Te Awatea: The Journal of Te Awatea Violence Research Centre*, 10 (1 & 2), 13-17.

molestation ultimately increasing tolerance for violence against women.’¹⁶² But remarkably, her paper, though quite scholarly, is purely sociological and not legal and therefore did not target the broad assessment of the legal framework for the protection of women’s right to dignity in India, Nigeria or South Africa or the gaps and advances inherent in each framework, or what lessons Nigeria may learn from any advances in the other two jurisdictions, which of course is the object of this instant research.

Holly Reed,¹⁶³ Anthony Ikechukwu Kanu¹⁶⁴ and Sharvari Karandikar, Caren Frost and Lindsay Gezinski¹⁶⁵ in their separate papers, cited patriarchy as a common rationale for certain violations, abuse and insubordination of women in South Africa, Nigeria and India respectively. This thesis accepts the fact that patriarchy constitutes a fundamental threat to the implementation of sustainable legal frameworks for protecting women’s right to dignity across the three jurisdictions of study.

Aloy Ojilere and Ching Chuan Gan¹⁶⁶ explored the essential role of judicial creativity and activism in the protection of women’s right to dignity in India and concluded that these advances can also reasonably apply as good lessons for bridging the gap in the legal framework for securing women’s right to dignity in Nigeria.

Kirsten Anderson¹⁶⁷ laid the entire blame of violence against women on “*harmful masculinities*” and that it is the obligation of states under international human rights law to ensure that these *harmful masculinities* are ‘*de-mystified, subjected to scrutiny and ultimately reconstructed in order for violence against women to be*

¹⁶² Kohli, A. (2012). Gang Rapes and Molestation Cases in India: Creating Mores for Eve-Teasing. *Ibid* at 17.

¹⁶³ Reed, H. (2014, July). Race and Patriarchy: Gender and Migration in South Africa During and after Apartheid. In *XVIII ISA World Congress of Sociology (July 13-19, 2014)*. Isaconf;

¹⁶⁴ Kanu, I. A. (2014). An Enquiry into the Religio-Cultural Experience of Women in Nigeria: Towards a Philosophy of Reciprocity. *AFRREV LALIGENS: An International Journal of Language, Literature and Gender Studies*, 1(2), 50-60.

¹⁶⁵ Karandikar, S., Frost, C., & Gezinski, L. (2014). Patriarchy and Gender-Based Violence: Experiences of Female Sex Workers in India. *International Journal of Social Work*, 1(1), 1-14.

¹⁶⁶ Ojilere, A., & Gan, C. C. (2015). Learning from the Indian Judiciary: New Directions for Securing Nigerian Women’s Right to Dignity. *Asian Women*, 31(1), 81-106.

¹⁶⁷ Anderson, K. (2008). Violence against Women: State Responsibilities in International Human Rights Law to Address Harmful Masculinities. *Neth. Q. Hum. Rts.*, 26, 173.

effectively eliminated.” This thesis thus assessed conformity to the basic principles of international law as the template for sustainable legal framework for the protection of women’s right to dignity and fundamental rights generally in the jurisdictions under review.

As if in response to Anderson, Sayadmansour and Momenirad¹⁶⁸ posits that after all, women’s right are *not* human rights because while human rights are *gender neutral* and attaches to all by virtue of their humanity, *women’s* rights are rights which attach specifically to women. This research disagrees with this argument even though it is philosophically appealing. Instead, the humble view of this researcher is that the need to protect the right to dignity of women is too critical a subject to be reduced to a gimmick of logic or mere semantics.

Barth, Bermetz, Heim, Trelle, and Tonia¹⁶⁹ examined Child Sexual Abuse (CSA) as a global phenomenon and concluded that girls are twice or thrice more likely to be victims than boys and that one out of every ten women has experienced and can recollect one indignifying form of sexual abuse between her childhood and adulthood. Their study did not focus on the legal framework for protection of women’s right to dignity in Nigeria, India and South Africa. Nevertheless, underscores the vulnerability of girls to sexual violations and the need to tackle the menace frontally.

Ortabag, Ozdemir, Bibis and Ceylan¹⁷⁰ undertook a study on how and what young adults in Turkey view the concept of violence against women. They concluded that most men violated women’s dignity rights without even knowing that violence against women is an offence under Turkish law. Their study did not relate to Nigeria, India or South Africa.

¹⁶⁸ Sayadmansour, A., & Momenirad, A. (2014). An Argument against Considering Women's Rights as All Belonging to the Category of Human Rights. *Chinese Journal of International Law*, jmu018.

¹⁶⁹ Barth, J., Bermetz, L., Heim, E., Trelle, S., & Tonia, T. (2013). The current prevalence of child sexual abuse worldwide: A systematic review and meta-analysis. *International journal of public health*, 58(3), 469-483.

¹⁷⁰ Ortabag, T., Ozdemir, S., Bibis, H., & Ceylan, S. (2014). Perspectives of Young Adult Men Regarding Violence against Women: A Cross-sectional Study from Turkey. *Journal of Family Violence*, 1-10.

Carol Arinze-Umobi and Amaka Iguh¹⁷¹ examined the role of two major international instruments, namely, the UN Convention on the Rights of the Child (CRC) and the African Union Charter on the Rights of Children, in the protection of children against sexual abuse in Nigeria. They also explored the “domesticated” version of these international instruments, that is, the Nigerian Child Rights Act, 2003 which as the authors rightly put it, ‘provide for the best interest of the child’¹⁷² and ‘supersedes all other legislation that have a bearing on the rights of the child.’¹⁷³ The authors however listed a number of “crucial and fundamental factors” which hinder the implementation and enforcement of the Act, to include the issue of *locus standi* under the Fundamental Rights (Enforcement Procedure) Rules, 2009 (whereby the child cannot sue in his own name but through a parent or guardian who may be financially constrained); the overbearing influence of culture whereby “no African child is bold enough to take his parents to court”,¹⁷⁴ and lack-lustre attitude of most Nigerian states to domesticate the Act at the state level consequent upon which, only 16 states out of Nigeria’s 36 states have promulgated a child Rights Law.¹⁷⁵ This incisive paper however did not consider the legal framework of other jurisdictions especially India and South Africa, nor did it suggest that judicial activism may be applied to bridge whatever gap inherent in the Child Rights Act, 2003.

Ko Ling Chan¹⁷⁶ concluded in his study that sexual abuse has a negative unique impact on the over all development of women and girls as well as their perception of their own dignity. Although the case study was Hong Kong Chinese and not Nigeria, India or South Africa, it however, underscores the contention of this thesis that sexual

¹⁷¹ Arinze-Umobi, C., & Iguh, A. (2011). Child's Sexual abuse: The Role of International Instrument in Nigeria. *Benue State University Journal of Private and Public Law, BSUJPPL*, 1(1), 71-79.

¹⁷² *Ibid* at p. 76.

¹⁷³ *Ibid* at 77.

¹⁷⁴ *Ibid* at p.78.

¹⁷⁵ *Ibid* at p. 77.

¹⁷⁶ Chan, K. L. (2011). Association between childhood sexual abuse and adult sexual victimization in a representative sample in Hong Kong Chinese. *Child abuse & neglect*, 35(3), 220-229.

abuse and violation of women's dignity is an issue of global concern, the difference being in the available legal frameworks for its protection in individual countries.

In their recent study, Fulu, Emma, Alice Kerr-Wilson, and James Lang¹⁷⁷ examined the causes and prevention of violence against women and girls (VAWG) with particular reference to sexual abuse and intimate partner violence (IPV) as a health cum socio-economic problem but not in relation to the abuse of the right to dignity of women in India, Nigeria and South Africa as a legal subject. Of essence to this thesis, the writers posited that VAWG is “one of the most widespread abuses of human rights worldwide, affecting one third of all women in their lifetime. It is the leading cause of death and disability of women of all ages and has many other health consequences.”¹⁷⁸ This underscores the significance and urgency of this thesis, in the quest for a sustainable legal framework for the protection of women's right to dignity in Nigeria, the most populous democratic country in Africa, with women accounting for nearly half of its population.

Jackie Dugard examined the scope of access to the South African Constitutional Court and criticized the court for being anti-poor and pro-rich. According to her, “in stark contrast to the highest courts in countries such as Colombia, Costa Rica and India, which regularly and generously grant direct access, the South African Constitutional Court only granted direct access in 18 cases in its first twenty years of operation (1994-2014). In comparison, the Constitutional Court of Costa Rica hears approximately 17,000 direct access applications each year (called *amparos*) and the Colombian Constitutional Court hears about 450 direct access applications each year (called *tutelas*).” Her paper did not make reference to the Supreme Court of Nigeria nor was it centred on women's right to dignity in any of the jurisdictions of study. Rather it was with respect to ESC Rights only.

¹⁷⁷ Fulu, E., Kerr-Wilson, A., & Lang, J. (2014). What works to prevent violence against women and girls. *Evidence Review of interventions to prevent violence against women and girls Pretoria: Medical Research Council.*

¹⁷⁸ *Ibid.*

Manfred Nowak¹⁷⁹ examined the role of the United Nations as a major stakeholder in the global protection of human rights and reiterated his earlier call for the establishment of a World Court on Human rights which may receive individual complaints of human rights violations, for according to him, ‘human rights create obligations of others, above all states, and the rights-holders should have a remedy to hold the duty-holders accountable before an independent court. This is the simple logic of rights, duties and accountability’ and that ‘human rights without a remedy are like the United Nations without Jakob Möller: an empty promise.’¹⁸⁰ This thesis relied heavily on this contention especially in the critique of the international framework for protecting women’s dignity.

Article 1 of the UN Declaration on the Elimination of Violence Against Women (DEVAW) defines "violence against women" as: “Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”

Adesina Coker¹⁸¹ concedes that domestic violence is a global issue but added that sometimes men are also the victims. He considered sexual violation of women’s dignity and recommended urgent review of the legislative deficiency in Section 6 of the Nigerian Criminal Code which defines *unlawful carnal knowledge* as “carnal connection which takes place otherwise between husband and wife.” The researcher agrees with the author that husbands should be criminally liable for sexual assault and rape of their wives in appropriate circumstances, as a sure means of curbing spousal

¹⁷⁹Nowak, M. (2014). The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights. *Nordic Journal of Human Rights*, 32(1), 3-17.

¹⁸⁰ See Nowak, M. 2009. “Eight Reasons Why We Need a World Court of Human Rights.” In *International Human Rights Monitoring Mechanisms – Essays in Honour of Jakob Th. Möller* (2nd edn), edited by G. Alfredsson, J. Grimheden, B. G. Ramcharan, and A. de Zayas, 697–706. Leiden; Boston: Martin Nijhoff.

¹⁸¹ Adesina Coker: *Critical Appraisal of Domestic Violence in Nigeria*, in Chapter 6 of *Gender and Power Relations in Nigeria*, Ronke Iyabowale Ako-Nai (ed) 2013 Lexington Books, Plymouth, UK, p. 77-86.

abuse and sexual indignity at home. The researcher however imagines the fate of a wife and her marriage if her husband is imprisoned in this circumstance.

Benson Kunle Shinde,¹⁸² and Dada,¹⁸³ commended the gender ideology and content of the National Gender Policy of Nigeria but regretted the inability of government to actually sustain them in practice. He opined, and the researcher agrees with him that the human rights of women in Nigeria will be improved greatly if the National Gender Policy (NGP) can be implemented, even if without any amendment. He did not consider the threat to effective implementation of the NGP posed by the non-justiciability of certain rights nor the capacity of the judiciary to hold government accountable through judicial activism, as has been effectively done in India.

Nwankwo,¹⁸⁴ Dada,¹⁸⁵ Ojilere and Chukwumaeze,¹⁸⁶ and Durojaye, Okeke and Adebajo¹⁸⁷ variously agree that the laudable provisions of the CEDAW and the National Gender Policy of Nigeria can hardly be implemented due to a number of constitutional and socio-political inhibitions including a defective and deficient legal framework and absence of judicial activism.

Chegwe¹⁸⁸ opined that the guarantee and enjoyment of fundamental rights in Nigeria will remain meaningless until Economic, Social and Cultural rights become justiciable and therefore agreed with both Anthony Uchegbu¹⁸⁹ and Akinola Aguda¹⁹⁰ that the proper enjoyment of the first generation (civil and political rights including the right to life) is dependent on the guarantee of the second generation rights (Economic, Social and Cultural Rights). The scholars made their assertion with respect to right to

¹⁸² Benson Kunle Shinde: An Overview of Legal and Implementation Framework of Nigeria's National Gender Policy. in Chapter 7 of Gender and Power Relations in Nigeria, Ronke Iyabowale Ako-Nai (ed) 2013 Lexington Books, Plymouth, UK, p. 87-100,

¹⁸³ Dada, J. A. (2013). Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal. *Journal of Law, Policy and Globalization*, 10, 1-18.; Dada, J. A. (2012). Impediments to Human Rights Protection in Nigeria. *Ann. Surv. Int'l & Comp. L.*, 18, 67.

¹⁸⁴ Nwankwo, O. (2013). "Nigeria is notorious for violating international agreements.". Lagos, Nigeria: Nigerian vanguard Newspaper.

¹⁸⁵ Dada, J. A. (2012). Impediments to Human Rights Protection in Nigeria. *Ann. Surv. Int'l & Comp. L.*, 18, 67.

¹⁸⁶ Ojilere, A., & Chukwumaeze, U. U. (2010). CEDAW and Gender-Based Discriminations against Women in Nigeria. *Nigerian Journal of Food, Drug and Health Law (NJFDHL)*, 3(1), 95-105.

¹⁸⁷ Durojaye, E., Okeke, B., & Adebajo, A. (2014). Harmful cultural practices and gender equality in Nigeria. *Gender and Behaviour*, 12(1), 6169-6181.

¹⁸⁸ Chegwe, E. N. (2009). Legalism and the Realization of the Right to Life. *Nigerian Journal of Public Law (NJPL)*, 2(1), 226-243.

¹⁸⁹ "The Concept of The right to Life under the Nigerian Constitution" Omotola (ed.) Essays in Honour of Justice T.O. Elias (Lagos; University of Lagos Press, 1981) p.153.

¹⁹⁰ New Perspective in Law and Justice in Nigeria, (National Institute of Policy and Strategic Studies, Kuru) 2002, p.8.

life. This thesis agrees with them but most humbly submits, that the right to human dignity too, cannot be enjoyed without the corresponding guarantee of adequate sanitation, housing, work, education and equal socio-political and economic opportunities. It is therefore understandable that Nnamdi Aduba¹⁹¹ agreed wholly with the dictum of Justice Bhagwati in the case of *Minerva Mills Ltd v. Union of India*¹⁹² that:

a large majority of people who are living in almost sub-human existence in conditions of abject poverty and for whom life is one long unbroken story of wants and destitution, notions of individual freedom and liberty, though representing some of the cherished values of a free society, would sound so empty...and the only solution for making those rights meaningful to them is to remake the material conditions and usher in a new social order where socio-economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured.

Durga Das Basu¹⁹³ wrote a detailed commentary on Indian Constitution generally. His book contains elaborate analysis, case-law and insight into India's judicial and constitutional advancement including the creativity and activism of the Supreme Court of India on the broad interpretation of fundamental rights. This confirms the contention of this thesis that an activist and "consequential" Supreme Court of Nigeria is a *sine qua non* for sustainable, realistic and reasonable reform of the constitutionalization and judicialization of women's right to dignity in Nigeria and other developing countries in similar circumstance.

¹⁹¹ J.N. Aduba, et al, "The Dynamics of Social and economic Rights" Proceedings of the 32nd Annual Conference of the Nigerian association of Law Teachers (NALT), May 10-13, 1994, University of Lagos, Akoka, Lagos, Nigeria.

¹⁹² (1990) AIR SC 1987.

¹⁹³ Commentary on the Constitution of India. 8th Edition, Vol. 3, 2008, LexisNexis Butterworths, Nagpur.

Justice Palok Basu¹⁹⁴ examined human rights protection in the Indian law and allied laws. He said that the right to gender equality and equal protection of the law in India must not only exist on paper but must be real, and that government is under an obligation to take steps to ensure its full application. The learned jurist cited the case of *Indra Sawhney v. Union of India*¹⁹⁵ where the Supreme Court also emphasised that:

A mere formal declaration of the right would not make unequals equal. To enable all to compete with each other on equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged.

This thesis agrees with this view, and contends that the fact that a Court has no enforcement mechanism of its own judgments remains a serious challenge to the implementation of a sustainable protection of women's right to dignity, not only in India, but in Nigeria and South Africa also.

Khwaja Abdul Muntaqim¹⁹⁶ made an incisive examination of nearly all the domestic and international legal instruments governing the protection of human rights in India, as well as relevant case law and commentary on the subject. It reveals that Indian Courts usually interpret municipal laws to conform to international law. This thesis is thereby inspired to recommend that Nigerian Courts need to apply international law in the interpretation of both the justiciable fundamental rights and the non-justiciable socio-economic rights (directive principles) irrespective of the inhibitions in Section 12 of the 1999 Nigerian Constitution with respect to *domestication* of international law or Section 6(6) (c) with respect to the non-justiciability of the directive principles.

¹⁹⁴ Justice Palok Basu, *Law Relating to Protection of Human Rights Under The Indian Constitution and Allied Laws*, (2002) Modern Laws Publications, Allahabad, India, p. 83.

¹⁹⁵ AIR 1993 SC 477.

¹⁹⁶ Khwaja Abdul Muntaqim. *Protection of Human Rights (National and International Perspectives)* (2004) Law Publishers (India) Pvt. Ltd. Pp. 308-1258.

Terry Buss and Usama Ahmed¹⁹⁷ examined dignity from the concept of Social equality and exclusion. They cited the definitions of the subjects according to the World Bank and IMF. They rightly explained that *social equality* implies equality in “rights, resources and voice” as well as equal access to all opportunities for pursuit and realization of a pleasant life and avoidance of extreme deprivations. Their paper was not particular to Nigeria, India and South Africa.

Sushree Sanghamitra Badjena,¹⁹⁸ examined the legislative framework for the protection of the right to dignity of women with regards to rape and sexual violence against women with disabilities in India and cited 14 recent instances to show that disabled women and girls are more vulnerable to indignities and abuse than the other women. The author noted that although Articles 14, 15 and 16 of the Constitution of India protect gender equality as well as mandate on the State to adopt measures of positive discrimination in favour of women, the Constitution does not include disability as a basis of non-discrimination. The author however posited that the enactment of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (also known as The Persons With Disability [PWD] Act), marks the ‘first time social and economic rights of the disabled have been addressed by a statute, even though the Act does not also make the necessary distinction between the men and women with disabilities.’ The author however conceded that the activism of the Indian Supreme Court has also been applied to bridge any incidental gaps in the constitutional and legislative provisions on the instant subject. He cited *Suchitra Srivastva v. Chandigarh Administration*,¹⁹⁹ where the Supreme Court had ruled in favour of the dignity, personal autonomy and reproductive rights of a mentally challenged woman who expressed willingness to continue a pregnancy, against the

¹⁹⁷ Buss, T. F., & Ahmed, U. (2015). Social Equity and Development. In N. J. Johnson & J. H. Svava (Eds.), *Justice for All: Promoting Social Equity in Public Administration* (pp. 56-75). New York, USA: Routledge.

¹⁹⁸ Badjena, S. S. (2014). Sexual Violence against Women with Disabilities and the Legislative Measures in India. *ODISHA REVIEW* (April-May 2014), 46-57., at 49-50.

¹⁹⁹ Civil Appeal No. 5845/2009, Supreme Court judgment dated 28 August 2009.

readiness of the Chandigarh Administration to permit its termination because of her disability based on the approval of the High Court.²⁰⁰

Chetna P. Bhadange²⁰¹ and Lakshmivempalli Lakshmi²⁰² also concede that the People With Disability Act, 1995 is a remarkable legislative feat in India. Although these authors did not include Nigeria and/or South Africa in their studies, this thesis however proposed that similar legislation be enacted to specifically enhance the protection of the sexual dignity of disabled women and girls in Nigeria, for instance, by relaxing the onus and standard of proof of criminal liability as well as imposing greater penal consequences on sexual violators of the mentally or physically vulnerable.

The Criminal Law (Amendment) Act, 2013 [No. 13 of 2013] of India which came into force on April 2, 2013, provides more protections against sexual indignities against women and children by the amendments which it made to sections of the Indian Penal Code, 1860,²⁰³ the Code of Criminal Procedure, 1973,²⁰⁴ the Indian Evidence Act, 1872,²⁰⁵ and the Protection of Children from Sexual Offences Act, (POCSO Act), 2012.²⁰⁶ This law clearly reflects a direct legislative response to the rape, sexual harassment and incidental offences against the dignity of women in India by creating serious punishment for any violations. More so, for the first time, *voyeurism* and *stalking* are defined as sexual offenses.

²⁰⁰ *Suchitra Srivastava v Chandigarh Administration*, AIR 2010 SC 235: The doctrine of *parents Patriae* invoked by the High Court was rejected by the Supreme Court and held that personal liberty in Article 21 includes right to make reproductive choice. The Supreme Court also stated that the doctrine is applicable in case of those persons who are minors or those who are found mentally incapable of making informed decisions for themselves. The court also referred the principle contained in United Nations Declaration on Right to Mentally Retarded Persons, 1971. In the given case the chairman of the National Trust for Welfare of persons has taken an affidavit to look after the interest of pregnant woman. (See Y.F. Jayakumar "Liberty and Reproductive Healthcare Justice: Indian Perspective" <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws7/w7-Jayakumar.pdf> (Accessed 29/8/2014); Also cited in Choudhury, A. D. (2012). *Review Jurisdiction of Supreme Court of India: Article 137*. Retrieved 29/8/2014, from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169967.

²⁰¹ Bhadange, C. P. (2014). *Socio-Legal Issues of Differently Abled Persons of India*. Paper presented at the UGC Sponsored National Seminar On 'Equitable Society with Equal Opportunities'.

²⁰² Lakshmi, L. (2013). The unanswered Social and Legal Issues Relating to Differently abled Persons in India. Retrieved 29/8/2014, from http://www.legalservicesindia.com/article/print.php?art_id=1559.

²⁰³ Act No. 45, 1860 (Oct. 6, 1860, as last amended in 1997).

²⁰⁴ Act. No. 2 of 1974 (Jan. 25, 1974, as last amended in 2006).

²⁰⁵ Act No. 1 of 1872 (Mar. 15, 1872, as amended),

²⁰⁶ Act No. 32 of 2012 (June 20, 2012).

With regards to the sexual and reproductive rights of women in India, some scholars especially Maya Unnithan and Stacy Leigh Pigg²⁰⁷ have expressed the view that “rights have arrived but justice has not followed”. This paper raises a sociological query as to why women still suffer sexual indignity in India in spite of good laws. This query is outside the scope of this research. However, having stated earlier that Nigeria currently lacks sustainable constitutional, law and policy as well as judicial activism necessary to secure women’s right to dignity, this thesis therefore relies on the truism that for any meaningful reform to in a democracy, a legal framework must “first” be put in place.²⁰⁸

Marius Pieterse²⁰⁹ insists that it is imperative that *rights* such as the “right to dignity of *women*” must be asserted because “Rights are powerful and empowering. They enable individuals and marginalised groups within society to assert themselves against powerful entities in the public and private spheres and, thereby, to draw societal attention to their plight.” He also rightly explained that *rights* help to establish a definite “claim” over/to what is being asserted “as moral and legal imperatives, rather than ‘mere’ [appeal] or cries for help” and thus impact on the manner in which society views delivery of such rights and demand accountability from those responsible for this delivery. This study was on South Africa only and did not include India or Nigeria.

Felicia Durojaiye Oyekanmi²¹⁰ considered gender equity and the exploitation of women from a socioeconomic perspective and pointed out that discrimination, exploitation and abuse of dignity of women begin even before the child is born due to the culture of male-child preference in some societies which sometimes climaxes with the conscious abortion of female fetuses. She equally noted that sometimes the baby

²⁰⁷ Unnithan, M., & Pigg, S. L. (2014). Sexual and reproductive health rights and justice—tracking the relationship. *Culture, health & sexuality*, 16(10), 1181-1187.

²⁰⁸ “Explaining India’s new anti-rape laws” (Explanatory interview of eminent Indian Supreme Court lawyer Karuna Nundy), BBC NEWS Asia, 28 March 2013. <http://m.bbc.com/news/world-asia-india-21950197>, (25/7/2014).

²⁰⁹ Pieterse, M. (2014). *Can Rights Cure? The impact of human rights litigation on South Africa’s health system*. Faculty of Law, University of Pretoria, South Africa: Pretoria University Law Press (PULP), p.1.

²¹⁰ Socioeconomic Dimensions of Gender Equality in Nigeria in Chapter 2 of Paradox of Gender Equality in Nigerian Politics: Essays in Honour of Dr.(Mrs.) Veronica Adeleke, Solomon O. Akinboye (ed) 2004 Concept Publications Ltd, Lagos, p. 41 -61.

girls are starved of food so that that baby boys will have enough to eat. The author noted that inequality and exploitation occur in various forms and is therefore multidimensional both conceptually and empirically, depending on a given socioeconomic background, and in her thinking, inequality and exploitation of women are most manifest in three areas, namely, prestige/integrity, power and access to resource control.

Mercy Onaodowan Erhun²¹¹ examined the rights of a married woman (wife) in Nigeria and agreed with Moronake Omonubi-McDonnell²¹² that it is an acceptable socio-cultural norm in Nigeria that a woman does not enjoy any independent personality but is always considered an appendage of a father or mother, and that this why women do not enjoy succession to the estate of their deceased husbands or fathers under most Nigerian customary practices. This researcher agrees with her that the fight for emancipation of the dignity of women in Nigeria will remain a tall dream unless pertinent customary law issues are redressed.

Chioma Agomo²¹³ also examined the legal framework for gender equality in Nigeria and posited that the quest for the actualization of equality in the human rights of men and women is global, transcends and not confined to any specific religious, cultural or economic zone.²¹⁴ She also considered the gender vis-à-vis the fundamental objectives and directive principles of state policy in Chapter 2 of the 1999 Nigerian Constitution and opined that the lofty provisions of Sections 15 to 24 are actually meaningless because they do not use gender as an analytical indices, do not fall *within the mainstream of fundamental rights' provisions*, do not consider the special role of women and therefore *cannot be said to be protective of their human rights*.²¹⁵ She also noted that the National Policy on Women adopted by the Federal Government of

²¹¹ Mercy Onaodowan Erhun: Appraisal of the Protection of Women's Rights under Nigerian Laws in Chapter 5 of Gender and Power Relations in Nigeria, Ronke Iyabowale Ako-Nai (ed) 2013 Lexington Books, Plymouth, UK, pp. 61-76 esp p.71.

²¹² Morolake Omonubi-McDonnell; *Gender Inequality in Nigeria* (2003) Spectrum Books Ltd, p.130.

²¹³ Chioma Agomo, *The Legal Framework For Gender Equality in Nigeria* in Paradox of Gender Equality in Nigerian Politics: Essays in Honour of Dr.(Mrs.) Veronica Adeleke, Solomon O. Akinboye (ed) 2004 Concept Publications Ltd, Lagos, pp. 91-100.

²¹⁴ *Ibid* at 91-92.

²¹⁵ P.93-95 *ibid*.

Nigeria in 2000 is a good working document which acknowledges that gender inequalities exist in law and practice in Nigeria but with a serious problem of implementation. She therefore advocated the need for a shift away from the usual Nigerian attitude of rhetoric and flamboyant legal and policy provisions in dealing with women-related issues to one of practical and sustainable implementation.²¹⁶ The renowned law professor did not however give examples of jurisdictions like India or South Africa from where Nigeria can learn lessons on democratic social justice, judicial activism and constitutionality.

In Ogugua Ikpeze's "Bride Price: The Female Customary Enslavement Mechanism in Nigerian Marriages,"²¹⁷ Ezebuilo Ukwueze's "Bride Price: Another Source of Violence against Women,"²¹⁸ and Veronica Okeke's "Women's Rights: The Bride Price Snare"²¹⁹ the authors view the right to dignity of women in Nigeria from the remote angle of Bride Price only. Ogugua Ikpeze, postulated that bride price, which is a fundamental prerequisite for any marriage in Nigeria, amounts to *chattelization and purchase of a wife*, making her an object of market value, extortion, servitude and slavery contrary to the guarantee of right to human dignity in the 1999 Nigerian Constitution. She cited *Solomon v. Ogbodo*,²²⁰ where a father threatened to give his daughter to another man in marriage if her present husband was unable to meet his demands. The author blamed this kind of exploitation on patriarchy which is usually characterized by the notion of domination, *superiority and ownership* of women by men.²²¹ She however, did not consider the judicial or legislative response to exploitation of women in India or South Africa but this has been done in this research.

²¹⁶ Pp.97-100 *ibid*.

²¹⁷ Chapter 15 in *Bride Price And The Implications for women's Rights in Nigeria*, Joy Ngozi Ezeilo and Josephine Edna Alumanah (ed) 2008 Joint Publication of WomenAid Collective (WACOL) in Partnership with the Faculty of Law, University of Nigeria, Enugu Campus and the Faculty of Social Sciences, University of Nigeria, Nsukka., pp. 183-201.

²¹⁸ *Bride Price and the Implications for women's Rights in Nigeria*, *op.cit*, Chapter 9, pp.115-124.

²¹⁹ *Bride Price and the Implications for women's Rights in Nigeria*, *op.cit*, chapter 12, pp.149-154.

²²⁰ (1974) 4UILR 396.

²²¹ *Op.cit* at 187.

Veronica Okeke²²² examined the overall implication of bride price on the integrity of a wife in marriage and concluded that most communities still opt for bride price irrespective of whatever shortcomings. In her opinion, it is rather ironic that no African man or woman will advocate for the abolition of bride price because a marriage in Africa has little or no value without the payment of bride price even if the couple bears children. She cited a BBC “Africa Live” Programme on the subject where, of the 37 respondents from various cultural backgrounds in Africa, 28 (75%) argued for bride price while only 8 respondents argued against it. She however linked poverty and domestic violence to bride price because it reduces the integrity of women and girls and make them vulnerable to various social, economic, health, and human rights hazards.

The Non-Governmental Organization, Feel Free Network²²³ documented cases in Uganda where women are compelled to endure various exploitations and abuse and still cannot leave the relationship because their families cannot afford to pay back the dowry, and in India where a woman faces the danger of dowry-related death if her in-laws consider the “groom’s price” paid by her family as inadequate.²²⁴

Ezebuilo Ukwueze²²⁵ posited that in nearly all countries of the world, women face exploitation and threat to their physical and sexual integrity. The author gave examples from countries including France, Switzerland, Egypt, Afghanistan, Bangladesh, Guatemala, Syria, Turkey, Guinea, Rwanda, Morocco, South Africa, Tanzania, India, Kenya and Uganda. She also identified trafficking, sexual exploitation, widow inheritance, ritual sexual cleansing, political, social and religious exploitation of women in Nigeria and said that under certain customary laws, parents order their daughters to drop out of school when she is too young just to marry a rich suitor who may even be old enough to be her father or in exchange/settlement of a huge

²²² *Op.cit* at 150-151

²²³ Now known as The Africa Feel Free Network and was launched in May 2002 with the goal of Strengthening the African Response to Violence and Abuse

²²⁴ See Glyn, *Bride Price African Pride or Prejudice?* <http://www.feelfreenetwork.org/index.php/bride-price>, (accessed on 26/5/2013)

²²⁵ *Op. cit*

debt owed by her father or family. She however cautioned that the fact that international human rights law recognizes, promotes and advocates the preservation of customs and traditions of a people as their cultural right and identity, this should not be practiced at the expense of the right of dignity and integrity of women and girls.²²⁶ The author did not refer to remedial protections offered in such circumstance by the judiciary in India or the Constitution in South Africa.

Youngindra Khushalani²²⁷ contends that the dignity of women remain inviolable even at war times and rape by combatants or paramilitary, rebels, humanitarians, civilians or other actors in the war obviously amounts to abuse of the dignity of women and to crime against humanity under the Rome statute of the International Criminal Court (ICC). This justifies the contention of this thesis that municipal courts must apply the principles of international law as a template for sustainable protection of women's right to dignity.

Gautam Bhan,²²⁸ however, argued that sometimes the application of the law towards the protection and enforcement of the right to dignity and sexual independence offered a misplaced solution to the problem, and that "the foundations of discrimination and violence on the basis of gender and sexuality was better fought in other battlegrounds – within the family, on the streets, in schools, through the written word, in public parks, in movements, through struggle." The writer was however particular about queer struggles in India and Uganda and the appeal against the decision in the Indian case of *Naz v. Union of India*²²⁹ which earlier held that India's anti-sodomy law contained in Section 377 of the Indian Penal Code was unconstitutional, null and void).

²²⁶ *Op.cit* at 117-120

²²⁷ Khushalani, Y. (1982). *The Dignity and Honour of Women as Basic and Fundamental Human Rights*: Martinus Nijhoff Publishers.

²²⁸ Bhan, G. (2014). Moving forward, perhaps: The 2013 India Supreme Court Decision on Section 377. In S. Corrêa (Ed.), *Putting the Law in its Place: Analyses of recent developments in law relating to same-sex desire in India and Uganda* (2014 ed., pp. 20-23).

²²⁹ *Naz Foundation v Union of India* CWP 7455 of 2001.

He was writing particularly on same-sex desire in India and not about Nigeria or South Africa, nor was he bothered about the right to dignity of *women* in India.²³⁰

Donald Horowitz²³¹ examined constitutional change as a *sine qua non* for a realistic quest for a sustainable legal framework for the promotion of democracy and human rights in Indonesia. Even though his erudite book did not deal with constitutional change or democracy in Nigeria, it underscores the contention of this thesis that a sustainable legal framework is the basis for any meaningful democratic reform, especially for the general protection of human rights and women's right to dignity particularly in Nigeria.

Jacques Bertrand,²³² in his review of Donald L. Horowitz's "Constitutional Change and Democracy in Indonesia" also emphasised the essence of 'deep constitutional reform' as the path to a realistic and sustainable democratic change, even in an ethnically diverse or complex political setting. This proposition has also been made with respect to Nigeria in the long-run. Judicial creativity and activism of the Supreme Court of Nigeria will however, offer immediate protection to women's dignity.

Jeremy Sarkins²³³ examined the importance and impact of 'constitutional borrowings' on the making of the Bill of Rights in the South African Constitution. Although his work did not cover Nigeria and India, this researcher humbly believes that Nigeria can similarly do a "constitutional borrowing" from South Africa and a "judicial borrowing" from India in order to set a new agenda for the legal framework for the protection of women's right to dignity in Nigeria. This researcher believes that India can also make a "constitutional borrowing" from South Africa so as to bring the economic,

²³⁰ However, in another case, *Suresh Kumar Koushal v Naz Foundation* Civil Appeal 10972 of 2013, also recorded as SLP 15436 of 2009) the Indian Supreme Court in December 2013, set aside the earlier High Court decision in *Naz Foundation v. Union of India*, *supra* and restored the validity of Section 377 IPC.

²³¹ Horowitz, D. L. (2013). *Constitutional change and democracy in Indonesia*: Cambridge University Press.

²³² Bertrand, J. (2015). A Review of "Constitutional Change and Democracy in Indonesia" Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia*. Cambridge: Cambridge University Press, 2013. Pp. 326. ISBNs 1107641152 and 978-1107641150. *Nationalism and Ethnic Politics*, 21(4), 493-495 at 493.

²³³ Sarkin, J. (1998-1999). "The effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and interpretation of Human Rights Provisions." *U. Pa. J. Const. L.* 1: 176.

social and cultural rights (ESC Rights) in the directive principles of its Constitution (which currently exists as *implied* rights by virtue of judicial activism and innovation of the Indian Supreme Court) into the realm of justiciable positive rights.

The Constitution of South Africa 1996 offers an international model in fundamental rights guarantee and protection for any constitutional democracy. It recognizes the economic, social and cultural and environmental rights as part of the Bill of Rights, unlike in Nigeria where they constitute negative rights or in India where they are enforced as implied rights. In its Section 39(2) it mandates all courts to always interpret and develop customary law and common law in such manner as to bring them in conformity with the Bill of Rights. This was confirmed by the South African Constitutional Court in the case of *Carmichele v. The Minister of Safety and Security & The Minister of Justice and Constitutional Development*.²³⁴

The South African Constitution also establishes Constitutional Court which is the highest court in the land in all constitutional matters including fundamental rights and human rights. At the formal inauguration of the court on 15th February 1994, the then President, Dr. Nelson Mandela, described the court as “a court South Africa has never had, a court on which hinges the future of our democracy.”²³⁵ This thesis considers this Presidential applause as a manifestation of total belief and commitment to the Constitutional Court to uphold the rule of law, equality and justice in South Africa as a disconnection from the official racial discrimination, abuse/denial of rights of the minority and manifest injustice Apartheid era.

This certainly explains why Heinz Klug²³⁶ described the South African Constitutional Court as being more committed to ‘judicial pragmatism rather than the symbolic judicial activism’ and one with ‘symbolic authority to publicly engage in

²³⁴ Case No. CCT48/00

²³⁵ <http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases> (Accessed on 7/6/2013)

²³⁶ Klug, H. (2013). Constitutional Authority and Judicial Pragmatism, Politics and Law in the Evolution of South Africa’s Constitutional Court *Consequential Courts: Judicial Roles in Global Perspective* (pp. 93-113). New York, USA: Cambridge University Press.

“transformative constitutionalism”- a rejection of the negative past, a generous interpretation of rights.’

Justice Dikgang Moseneke²³⁷ of the Constitutional Court equally boasts that “our courts have been more progressive than any jurisdiction I know in the world.” These descriptions are legendary and underscores the contention of this thesis that judicial creativity and activism is the most viable approach for bridging the fundamental gaps in the current legal framework for the protection of women’s right to dignity in Nigeria.

Gender equality in marriage and inheritance were recognized by the said Constitutional Court in *Shilubana & Ors v. Nwamitwa*²³⁸ and *Elizabeth Gumede v. President of the Republic of South Africa & Ors.*²³⁹ Other landmark judgments including *Government of the Republic of South Africa v. Grootboom*²⁴⁰ and *Minister of Health v. Treatment Action Campaign*²⁴¹ where the Constitutional Court of South Africa confirmed the socio-economic rights to housing and health respectively, as basic fundamental rights, makes this researcher to hold the view that the Court has, indeed, lived up to its bidding as a model best practice in the protection of fundamental rights and constitutional democracy.²⁴²

Cassels Jamie²⁴³ and Manoj Mate²⁴⁴ examined Public Interest Litigation (PIL) as a landmark of judicial activism of the Indian Supreme Court. Cassels stated that if the complaint is of a 'legal wrong' the appropriate forum is the High Court of the state under Article 226 of the Constitution. If a 'fundamental right' is alleged to have been

²³⁷ Moseneke, D. (2012). 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa, *The. Geo. LJ*, 101, 749.

²³⁸ (2008) ZACC 9.

²³⁹ (2008) ZACC 23.

²⁴⁰ [2000] ZACC 19.

²⁴¹ Case No. CCT/8/02. Heard on 2, 3 and 6 May, 2002. Decided on 5 July 2002.

²⁴² The doctrine of direct access in Section 167 permits a person to bring an action directly to the Constitutional Court or to appeal directly to the court, in exceptional cases, when it is in the public interest and with leave of the Constitutional Court.

²⁴³ Cassels, J. (1989). Judicial Activism and Public Interest Litigation in India: Attempting the Impossible? *The American Journal of Comparative Law*, 495-519.

²⁴⁴ Mate, M. (2013). Public Interest Litigation and the Transformation of the Supreme Court of India. In D. Kapiszewski, G. Silverstein & R. A. Kagan (Eds.), *Consequential Courts: Judicial Roles in Global Perspective* (pp. 262-268). New York, USA: Cambridge University Press.

violated the remedy may be sought from the High Court or directly from the Supreme Court under Article 32. He also noted that PIL guarantees direct access to justice especially for the “less advantaged individuals and groups” who might more realistically consider asserting their interests through the courts, and that by liberally interpreting constitutional provisions the courts have further sought to rebalance the scales of justice.²⁴⁵ Mate concludes that the Indian Supreme Court remains ‘one of the most powerful Constitutional Courts in the world,’ just like the Constitutional Court of South Africa.

Martin Shapiro²⁴⁶ agrees with this conclusion but considered it “the mighty problem” of constitutional review ‘when, where and why the powers that be’ would allow ‘a handful of judges without purse or sword get away with making major policy decisions?’ The writer rightly concedes however, that ‘judicial review courts are often consequential’ and that ‘a strong measure of judicial independence might be a prerequisite to judicial review as an instrument of limiting government and protecting rights... [this] necessarily involved some judicial law-making.’²⁴⁷ This justifies the recommendation of this thesis that judicial creativity and activism in the Supreme Court of Nigeria, especially in the just, fair and reasonable interpretation of fundamental rights is a *sine qua non* for the sustainable protection of women’s right to dignity in Nigeria, just as in the case of the Indian Supreme Court and the South African Constitutional Court.

Paul O’Connell²⁴⁸ had earlier contended that in spite of all the praise for the Supreme Court in India and the Constitutional Court in South Africa, ‘over the last decade, apex courts in Canada, India, and South Africa – which have traditionally been

²⁴⁵ *Ibid* at 498.

²⁴⁶ Shapiro, M. (2013). The Mighty Problem Continues. In D. Kapiszewski, G. Silverstein & R. A. Kagan, (Eds.), *Consequential Courts- Judicial Roles in Global Perspective* (pp. 380-397). New York, USA: Cambridge University Press.

²⁴⁷ *Ibid* at 380.

²⁴⁸ O’Connell, P. (2011). The Death of Socio-Economic Rights. *The Modern Law Review*, 74(4), 532-554.

viewed as socio-economic rights friendly – have issued judgments fundamentally at variance with the meaningful protection of socio-economic rights.’

Rehan Abeyratne²⁴⁹ holds a similar view and argues that it amounts to a “judicial overreach” which “threatens the Constitution’s legitimacy” for the Indian Supreme Court to have premised the rationale for the enforcement of socio-economic rights within Article 21 of the Constitution. This thesis does not share this view because the judicial review function of a court is beyond question, even though it is conceded that judges may descend in the arena as a result of selfish political, tribal or socio-religious, or other interests. Consequently, this thesis has cited judicial corruption as one of the challenges imminent to the implementation of recommendations for a sustainable legal framework for the protection of women’s right to dignity in Nigeria.

Yaniv Roznai²⁵⁰ opined that in the exercise of its activism, constitutional courts should be mindful of its “legisprudence limitations on constitutional amendments” so as not to annul a constitutional act which derives its force from the same source as the Constitutional Court, otherwise the Court will invariably be threatening its own legitimacy. His caution was however directed at the Czech Constitutional Court only. However, issues therein raised may apply, *mutatis mutandis*, to the Supreme Courts of Nigeria and India, as well as the Constitutional Court of South Africa.

Interestingly too, Akinola Ebunolu Akintayo²⁵¹ examined the Nigerian case of *Bamidele Aturu v. Minister of Petroleum Resources*²⁵² vis-à-vis the decision of the South African Constitutional Court in *Mazibuko & Ors v. City of Johannesburg &*

²⁴⁹ Abeyratne, R. (2014). Socioeconomic Rights in the Indian Constitution: Toward A Broader Conception of Legitimacy. *Brooklyn J. Int'l L.*, 39, 1-521.

²⁵⁰ Roznai, Y. (2014). Legisprudence Limitations on Constitutional Amendments? Reflections on The Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act. *Reflections on The Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act (April 10, 2014)*, 8(1), 29-57.

²⁵¹ Akintayo, A. E. (2014). A good thing from Nazareth? Stemming the tide of neo-liberalism against socio-economic rights: Lessons from the Nigerian case of *Bamidele Aturu v Minister of Petroleum Resources and Others*, *ESR Review: Economic and Social Rights in South Africa*, 15(2), 5-9.

²⁵² Suit No: FHC/ABJ/CS/591/09.

Ors,²⁵³ and concluded that while the decision in *Mazibuko* obviously played down the ESC Rights, the *Bamidele* case seems to have stepped it up, and that on this singular note, even the South African Constitutional Court now has at least one lesson to learn from the Nigerian Court. The case was however unrelated to women's right to dignity.²⁵⁴

Amidst these few criticisms,²⁵⁵ Daniel Bonilla Maldonado insists that South Africa and India offer classical examples for *activist tribunals* for the *structural transformation* of society and protection of the right to dignity of women because 'the independence and effectiveness of the Supreme Court of India and the Constitutional Court of South Africa, especially with regards to democratization and structural transformation in public and private spheres of their respective countries are gradually creating what can be called a constitutionalism of the Global South.' Consequently, this thesis contends that the Nigerian Supreme Court stands to learn valuable lessons from the creativity and activism of the Indian Supreme Court, and the pragmatism of the South African Constitutional Court.

Hammudah 'Abd al 'Ati²⁵⁶ examined the relationship of men and women in Islam and posited that it is a wrong and fallacious interpretation to hold that Islam places men above women, especially in marriage. The author rather opined that Islam considers them complementary to each other and this thesis agrees.

The above literature are quite revealing but a keen perusal will reveal that none of them relates specifically to the legal framework for the protection of women's right to dignity in the three jurisdictions of study, that is, Nigeria, India and South Africa. None of them

²⁵³ 2010 (3) BCLR 239 (CC).

²⁵⁴ But according to the author, "[i]n Nigeria, which has a supposedly weaker form of socio-economic rights framework and protection, a court in the recent case of *Bamidele Aturu v Minister of Petroleum Resources* (Suit No: FHC/ABJ/CS/591/09) (*Bamidele Aturu*) struck down the Nigerian government's deregulation of the downstream sector of the petroleum industry as unconstitutional. This is because the policy violates the socio-economic objectives of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)."

²⁵⁵ Maldonado, D. B. (2013). *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*: Cambridge University Press.

²⁵⁶ *The Family Structure In Islam*, Saudi Arabia: International Islamic Publishing House, 1977.

also made a search in India and/or South Africa to find lessons which may be applied to bridge the gaps in the Nigerian constitutional, legislative, policy and/or judicial framework for the protection of the right to dignity of women. This research will therefore explore these grey areas as a unique contribution to global legal and social scholarship.

However, these literature variously and collectively enabled this researcher to piece together vital information used in this thesis. Jointly and severally, they also provide vital information applied in the constitutional, judicial, law and policy analysis, comparisons, critiques and recommendations made in this thesis with respect to women's right to dignity in international law, Nigeria, India and South Africa.

CHAPTER 2

THE INTERNATIONAL AND REGIONAL FRAMEWORK FOR THE PROTECTION OF THE RIGHT TO DIGNITY OF WOMEN IN NIGERIA, INDIA AND SOUTH AFRICA

2.1 Introduction

The breach of the right to dignity of women in whatever manner including rape, marital or otherwise, is humiliating and degrading and constitutes a gross violation of international law.¹ Even the United Nations classify them as violence against women and provides appropriate legal framework for the protection of women against these and other forms of abuse, exploitation and violence. It also enjoins member states to prohibit them by legislation and provide legal and institutional framework to guarantee the implementation and enforcement of these rights and protections, as well as punishment for their violations and remedy/rehabilitation for victims. This chapter will examine these UN instruments in relation to the right to dignity of women. This will involve the review of certain Human Rights Documents and Conference Documents of the United Nations.

The chapter reviewed the African Charter on Human and Peoples' Rights including its Optional Protocols, the African Commission, the African Human Rights Court, as well as the African Charter on the Rights and Welfare of the Child. It further examines the commitment of states (that is, Nigeria and South Africa only), to the regional framework because there is no Asian regional human rights mechanism to which India may be bound. Finally, it makes a critique of the African regional framework and suggests the way forward. This chapter underscores the availability of a

¹ See particularly, the Universal Declaration of Human Rights, 1948; the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984 (Entered into force in 1987); Convention on the Rights of the Child, 1990; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 (With General Recommendation 19 of 1992 and Optional Protocol of 2000); Declaration on the Elimination of Violence against Women (DEVAW) 1993 and the Rome Statute of the International Criminal Court, 1998 (Entered into force July 1, 2002) which declared rape as crime against humanity.

globalized and uniform legislative framework for the protection of the right to dignity of women and girls, which serves as template for regional, sub-regional or municipal protection of women and girls (as the case may be) in each UN member state.

Generally, UN member states have three-pronged substantive obligations to international human rights law namely: Obligation to Respect, Obligation to Protect and Obligation to fulfil² these international human rights treaties. These obligations constitute the yardstick for measuring human rights protection in the respective states because it generally leaves the states with no discretion on the application of international human rights law.³

2.2 Basic Human Rights Documents

These are the major UN documents which guarantee worldwide protection human rights and fundamental freedoms on the basis of human equality in international law irrespective of age or sex. These basic or core human rights documents are known as the international bill of human rights and they are made up of the human rights provisions of the UN Charter, 1945 (particularly the Universal Declaration of Human Rights, UDHR 1948) and its implementing covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 (which entered into force in 1976), as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.⁴

² De Schutter, O. (2010). International human rights law: cases, materials, commentary: Cambridge University Press.

³ See the decision of the Constitutional Court of South Africa in the case of *F (Applicant) v Minister of Safety and Security & 50rs CCT 30/11 [2011] ZACC 37* (Heard on 4 Aug 2011, Decided on 15 Dec 2-11).

⁴ “India has signed and ratified important human rights conventions but not ratified the Torture Convention. On the other hand, it has not acknowledged any of the individual complaints procedures and any of the Optional Protocols to these conventions. It has entered substantive reservations to ICCPR, ICESCR, and the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW). But, negative endorsement made by India at the time of signing the treaty, (India while ratifying ICCPR had made a specific reservation that it does not recognize a right to compensation for victims of unlawful arrest or detention) was discarded by the Supreme Court in *D.K. Basu v. State of West Bengal* (1997 (1) SCC 416) when it was held that the reservations of India have lost significance given that the [proper law has been] established by the Supreme Court in ample of cases.”: See R. Bhanu Krishna Kiran, “*The Practice of*

Although these basic UN documents do not specifically address exploitation of women, violence against women or domestic violence, they, alongside the Optional Protocol to the ICCPR, articulate the duty of States Parties to protect every fundamental human rights including those commonly violated with respect to women. These include the right to life, the right to human dignity, freedom from discrimination, right to equality and to the equal protection of the laws.⁵

2.2.1 Charter of the United Nations

The United Nations Charter was signed in San Francisco, United States of America at the conclusion of the United Nations Conference on International Organization on 26 June 1945, and took effect on 24 October 1945. The UN Charter also contains the Statute of the International Court of Justice.⁶

Interestingly, the purposes and principles of the United Nations include “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”⁷ and “to be a centre for harmonizing the actions of nations in the attainment of these common ends.”⁸

It has, thus, been said that the human rights provisions of the UN Charter are “woven through and through the document”, in the statement of purposes, the chapter on the General Assembly, on trusteeship, on economic and social co-operation and on the

International Law In India: An Overview” International Journal of Legal Studies and Research (IJLSR) Vol. 2 No. 2 Sept 2013, p. 221.

⁵ Stop Violence Against Women, Domestic Violence law and Policy, University of Minnesota Human Rights Library, <http://www1.umn.edu/humanrts/svaw/domestic/laws/international.htm>. (16/3/2014).

⁶United Nations, <http://www.un.org/en/documents/charter/intro.shtml>.

⁷ Chapter 1, Article 1.3 of the UN Charter.

⁸ Chapter 1, Article 1.4 of the UN Charter.

Economic and Social Council.⁹ Specifically, these human rights provisions are contained in the Preamble to the Charter as well as some of its Articles.¹⁰

In its Preamble, the UN Charter expresses clearly, the *determination* of the world body *inter alia*, “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and also to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”

It suffices that the UN obliges itself to promote women’s dignity and equality worldwide and to ensure that member states observe, domesticate and comply with the international templates contained in the basic UN Human Rights Documents, thematic Human Rights Documents and main Conference Documents.

Article 1.3 provides that one of the purposes of the UN is: “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” as well as “To be a centre for harmonizing the actions of nations in the attainment of these common ends.”¹¹

In Article 8, the United Nations sets the pace for equality of women and men in employment and participation by providing that “the United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.”

⁹ Edward R. Stettinius, Jr. “Human Rights in the United Nations Charter”, JSTOR: Annals of the American Academy of Political and Social Science, Vol. 243 (Jan., 1946), p.1

¹⁰ Especially 1, 8, 13, 55, 56, 62, 68 and 76.

¹¹ Article 1.4

Article 13.1.b mandates the UN General assembly with the responsibilities, functions and powers of “promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

Article 55 expresses the resolve of the UN to *promote* healthy international relations and mutual co-operation in cultural, socio-economic, health and allied issues¹² as well as equality and international reciprocal respect for the “observance of human rights and fundamental freedoms for all without discrimination as to race, sex, language, or religion.”¹³

Article 56 makes a *pledge* that all UN member states shall “take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.”

Its Article 62 defines the powers and functions of the ECOSOC (Economic and Social Council) which shall include, if necessary, the making of “recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedoms for all,¹⁴ preparation and submission of draft conventions to the General Assembly, with respect to matters falling within its competence,¹⁵ and according to UN-prescribed rules, to convene international conferences on matters falling within its competence.¹⁶

Article 68 states the *procedure* for the performance of the functions of the ECOSOC which shall be to “set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions”.

¹² Article 55.b

¹³ Article 55.c

¹⁴ Article 62.2.

¹⁵ Article 62.3.

¹⁶ Article 62.4.

Article 76 contains the *basic objectives of the trusteeship system*, in line with the Purposes and Objectives of the UN set forth in Article 1, and which shall include the recognition and tolerance of the interdependence of the peoples of the world, the respect for global human rights and fundamental freedoms for everyone without regard to race, sex, language, or religion, as well as equal treatment and equality in the administration of justice.

2.2.2 The Universal Declaration of Human Rights (UDHR)

After the blood bath and atrocious human rights violations which characterized the Second World War, the international community saw the urgent need to create a world of peace, tolerance, respect for the sanctity of humanity as one race and the protection of human rights an international subject. This led to the creation of the United Nations. Thereafter, world leaders met and resolved to develop a road map which will complement the Charter of the United Nations and guarantee protection for the rights of every individual member of the world community. Thus, the document now known as the Universal Declaration of Human Rights was considered at the first session of the UN General Assembly in 1946 and later adopted as resolution 217 A (III) of December 10, 1948 by the General Assembly, meeting in Paris.¹⁷

The primary essence of the UDHR as an International Bill of Rights is to create “a common standard of achievement for all peoples and all nations” for the guarantee of man’s fundamental freedoms and equality.

¹⁷ The Commission on Human Rights which earlier authorized the formulation of the UDHR as “a preliminary draft International Bill of Human Rights” was made up of 18 members from various political, cultural and religious backgrounds. Eleanor Roosevelt, widow of former American President Franklin D. Roosevelt, chaired the UDHR drafting committee. <http://www.un.org/en/documents/udhr/history.shtml> (3/3/2014).

This is obvious from its preamble thus:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law...

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations...¹⁸

Even the United Nations proudly describes the UDHR as an important document which “sets out, for the first time, fundamental human rights to be universally protected.”¹⁹

¹⁸ See Preamble to the UDHR. This author has italicized certain portions thereof to lay emphasis on their importance and relevance as an international template for human rights protection.

¹⁹ <http://www.ohchr.org/en/udhr/pages/introduction.aspx> (4/3/2014).

The UDHR contains thirty articles, most of which provides for various rights and guarantees which apply to the human race generally as one family. Accordingly, each and every one of those rights applies to both women and men in equal force.

The UDHR considers humanity as one big family where each member is born free, endowed with conscience and reason as well as equality in rights and dignity, and should thus relate to one another as brothers.²⁰ It also guarantees everyone's right to life, liberty and personal security²¹ as well as all other rights and freedoms contained in the Declaration, without any manner of distinction or discrimination on the basis of ethnicity, 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' including 'the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'²²

Its articles 4 and 5 respectively prohibit human slavery, servitude or slave trade and the imposition of torture or cruel, inhuman or degrading treatment or punishment on any person.

The Declaration also accords everyone global citizenship and personality for the purpose of legal protection.²³ It is therefore understandable that in *Chairman, Railway Board v. Mr. Chandrama Das*,²⁴ the Indian Supreme Court upheld the verdict of the Calcutta High Court that a Bangladeshi woman who was gang-raped by some railway workers in India was entitled to the protection of right to life under Article 21 of the Indian Constitution as well compensation for damages.

²⁰ Article 1.

²¹ Article 3.

²² Article 2.

²³ Article 6.

²⁴ *Chairman, Railway Board v. Mr. Chandrama Das*, AIR 2000 988.

Similarly, the declaration recognizes human equality before the law and non-discrimination in the equal protection of the law. It also prohibits the least incitement to discriminate.²⁵

Article 8 of the UDHR is crucial because it guarantees women and men, boys and girls, the right to obtain legal redress before a law court or other competent tribunal for any violations of rights which they may suffer. And in the event of a criminal prosecution, every person shall be entitled to fair and public trial before an independent and unbiased court.²⁶

Under Article 11 of the UDHR, a person has a right to be presumed innocent of any charge against him until he is pronounced guilty in law. Furthermore, no person shall be compelled to stand trial for any act which was not a punishable offence under municipal or international law at the time of its commission, nor shall a heavier punishment be imposed outside of what is provided in the written law for the particular offence.

With particular reference to cultural exploitation of women in Nigeria and India, it must be noted that most of those traditional cultural practices, widowhood rites, humiliations, deprivations, socio-religious mythologies and other exploitation and violations which women suffer in these countries constitute a gross violation of certain specific and unambiguous rights guaranteed in international law.

It is therefore on this premise that the UDHR is considered an international template for protecting the human rights of both women and men worldwide (and not of men alone) and this is reflected in its Article 12 which provides unequivocally that,

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.

²⁵ Article 7.

²⁶ Article 10.

Everyone has the right to the protection of the law against such interference or attacks.

In Article 16, the UDHR recognizes the equality of spouses in marriage and divorce, and guarantees the right to marry and found a family to “men and women of full age”²⁷ only. It also provides that a marriage shall not be validly contracted unless and until both intending parties give their free and full consent to it.²⁸ It also obliges society and the state to protect family life because “the family is the natural and fundamental group unit of society.”²⁹

Article 17 of the Declaration further recognizes the right of women to own immovable property either jointly or severally as well as a right not to be deprived of same arbitrarily.³⁰

The totality of Articles 16 and 17 of the UDHR thus makes the Ibo marriage custom or culture of “male godhood” unlawful which permits men to consider their wives as “their property” which they “bought” with their money: bride price. Same illegality applies to customs which allow child marriages, and where girls of school age are forced into early marriage by their parents without their consent or where Islamic Sharia law permits parents to choose husbands for their virgin daughters.³¹

Article 21 gives to everyone the right of equal access to public service of their country as well as the right to participate in its political activities and governance, thus making “wife confinement”, whereby some Muslim women in Nigeria are locked up in *Purdah* an unlawful socio-religious practice which is a gross violation of human rights in international law.

²⁷ Article 16(1).

²⁸ Article 16(2).

²⁹ Article 16(3).

³⁰ Article 17(2).

³¹ Yusuf, H. B. (2005). Sexuality and the marriage Institution in Islam: an Appraisal. *African Regional Sexuality Resource Center*.

Under Article 22, women invariably have the right to social security benefits commensurate with the resources available in their country as well as the enjoyment of the economic and socio-cultural rights necessary for their dignity, personality and overall development.

Article 23 provides the right of equality in work and payment for work as well as the freedom to choose suitable employment worthy of human dignity without discrimination. This suffices that the use of *Dalit* women as slave labourers in garment factories in India is a gross violation of human rights, which of course is being addressed by judicial activism of the Indian courts as introduced by the likes of Justice P.N. Bhagwati, former Chief Justice of India.

Article 25 is also imperative because it specifically creates legal protection and privileges for women, including mothers, widows and children. It provides thus:

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance.

All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26 guarantees the right to free, compulsory early education as well as equal access to technical, professional and higher education according to merit.³² The article also provides that such education shall be directed to promote the advancement of the human personality, friendship, racial and socio-religious tolerance and world peace.

³² Article 26(1).

Article 28 makes everyone an equal partaker in a society for the enjoyment of the rights and freedoms contained in the UDHR.

The foregoing provisions of the UDHR including its preamble, make it safe to conclude that any and every manner of abuse, cultural exploitation or violation of the rights of women and girls everywhere in the world particularly in India and Nigeria, amounts to an affront on the rights and protections offered *everyone* under international law and therefore a gross violation of human rights for which redress must be sought and obtained.

2.2.3 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is a multilateral agreement which was adopted and opened for signature, ratification and accession on 16th December 1966 by General Assembly resolution 2200A (XXI). It became enforceable on March 23, 1976, *vide* Article 49.

The ICCPR mandate state parties to respect the civil and political rights of individuals, including the right to life, free speech, assembly and religion as well as political rights of participation in the electoral process, right to fair trial and due process.

The ICCPR is patterned like the UDHR: its core provisions cover the individual and political rights of both women and men. It has a preamble, fifty-three articles and divided into six parts.

The Preamble to the covenant recognizes the need to promote equality and dignity of women and men as a necessity for world peace. It thus states that,

the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and that “these rights derive from the inherent dignity of the human person.

Also that “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”

It thus, obliges States to promote universal respect for, and observance of, human rights and freedoms in accordance with the Charter of the United Nations. It also recognizes the duty of man to other men and to society to “strive for the promotion and observance of the rights recognized in the present Covenant.”³³

Part 1 (Article 1) recognizes people’s right to self-determination and political independence and status, including the right to freely pursue their economic, social and cultural goals, and manage and dispose of their own resources without external threat or intrusion.

Part 2 (Articles 2 – 5) obliges states to use legislation, where necessary, to guarantee the rights recognised in the Covenant, and to provide effective legal redress for any violation of those rights, even if they were meted by state actors.³⁴

The covenant further provides for gender equality under the law and for protection of the law,³⁵ “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”³⁶ even “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed”,³⁷ including a mandate on states to provide

³³ Preamble to the International covenant on Civil and political Rights, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

³⁴ Article 2.3(a)

³⁵ Article 2.3(b); Article 26 contains a similar provision.

³⁶ Article 2.1; See also Article 26 which “prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

³⁷ Article 4.1

appropriate legal remedy against human rights violations as well as competent authorities to enforce those remedies.³⁸

Specifically, as with the UDHR, certain rights recognized in the ICCPR also provide direct protection of rights for women and not just men. These rights include the following:

Article 6 provides for right to life, legal protection of life and prohibition of arbitrary deprivation of life.

Article 7: Right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, including the right not to be subjected to medical or scientific experimentation without consent.

Article 8 contains the right to freedom from every manner of slavery and slave-trade,³⁹ servitude⁴⁰ and forced or compulsory labour.⁴¹

Article 9 provides for the right to liberty and security of person and declares every illegal detention as unlawful and liable for compensation. It suffices that the practice of “wife detention” in Islam may be redressed under this article.

By Article 10, all persons held in lawful custody shall be treated with humanity and with respect for the inherent dignity of the human person. In India, this right is reflected in the *rule in Sheela Barse*⁴² for the protection of women in custody.

Article 16 provides for a person to be recognized everywhere as a person before the law while Article 17 prohibit every arbitrary interference with one’s privacy, family, home

³⁸ Article 2.3(c)

³⁹ Article 8.1

⁴⁰ Article 8.2

⁴¹ Article 8.3

⁴² In *Sheela Barse v. Union of India*, AIR 1987 (1) 153, the court made certain prescriptions for the protection of women in custody, including: 1). That the interrogation of females must be carried out in the presence of female Police officers; 2). That female suspects must be kept in separate police lock-ups under the supervision of female constables only; 3). That the police officer in-charge at any station/post must take responsibility for the safety of women in custody and ensure that bodily searches on them are conducted decently by women officers only; 4). That Notice should be conspicuously put in each police lock-up informing arrested persons and detainees of their rights; 5). That a woman judge or judicial officer should be appointed to carry out regular surprise visits to police stations to verify that all legal safeguards for the protection of the dignity of female detainees are being enforced.

or correspondence, as well as to unlawful attacks on one's honour and reputation, including legal protection against any such interference or attacks.

Article 18 guarantees the freedom of thought, conscience and religion while Article 23 mandates that men and women can marry and found a family as long as they are of marriageable age and have freely volunteered their full consent.⁴³ This article further enjoin States to adopt measures to guarantee equality of rights and obligations of spouses in and upon dissolution of the marriage, including protection of the best interest of any child(ren) of such dissolved marriage.

Article 25 guarantees the right to political participation, affiliation to a political party and the right to vote and be voted for.

Certain specific portions of the ICCPR, namely articles 6, 7, 8 [paragraphs 8(1) and 8(2)], 11, 15, 16 and 18 are declared sacrosanct by Article 4.2 to the extent that "No derogation from [these] articles may be made" even "in time of public emergency which threatens the life of the nation."⁴⁴ These preceding provisions/rights in the ICCPR offer women protection against all manner of humiliation, exploitation and abuse of rights including cultural exploitation.

Article 3 of the covenant is particularly important because under it, 'the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.'

The ICCPR contains two Optional Protocols. The First Optional Protocol creates an individual complaints mechanism whereby private individuals can complain to the Human Rights Committee about violations of the Covenant. The Second Optional Protocol simply abolishes the use of death penalty as punishment for crime except most

⁴³ Article 23.2 and article 23.3 respectively.

⁴⁴ Article 11 provides that no one shall be imprisoned for failing to honour a contractual obligation while article 15 prohibits the imposition of punishment in retrospect for "any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

serious crimes of a military nature, committed during wartime. By this Optional Protocol, member states may impose death penalty for such crimes as violent rape and ethnic cleansing committed at wartime.

This confirms the contention of this thesis that rape is a heinous violation of women's dignity in international law, and necessitates the obligation on states to provide sustainable legal framework to redress and protect against every such violation. It further underscores the primacy of equal protection of women's human rights as well as the sacredness of women's sexual dignity and honour, which are core to the findings and recommendations made in this thesis.

2.2.4 International Covenant on Economic, Social and Cultural Rights

The establishment of the International Covenant on Economic, Social and Cultural Rights (ICESCR) followed the adoption of Resolution 2200 A (XXI) by General Assembly of the United Nations on 16th December 1966. It became enforceable on 3rd January 1976 and India and Nigeria are signatories to the Covenant.

The Preamble to the ICESCR recognise, among others, that cultural and socio-economic rights are inseparable from the "inherent dignity of the human person" and that the enjoyment of the right and freedom against fear and want is only be achievable if conditions exists for enjoying of economic, socio-cultural, political and civil rights.

Core rights under the Covenant include Article 6: The right to work; Article 7: the right to favourable and just conditions of work; Article 8: the right to freedom of association to join trade unions and to participate in workplace strikes; Article 9: the right to enjoy social security, insurance and allied benefits; Article 10: the right to safety and protection of family as well as the prohibition of child labour; Article 11: the right to a standard and adequate living condition, and to the continuous improvement of those

living conditions for family and self, including the enjoyment of basic shelter, food and clothing; Article 12: the right to attain optimal standard of mental and physical health; Articles 13 and 14: the right to education, the free choice of parents to choose between public and private schools for their children and Article 15: the right to participate in cultural activities and to benefit from innovations in science, technology and research.

The supervisory body of the ICESCR is the Committee on Economic, Social and Cultural Rights which was set up under the ECOSOC in 1985 to monitor the implementation of the terms of the Covenant. The Committee is constituted by 18 experts who are usually elected by secret balloting from amongst nominees presented by the member states to the Covenant. These Committee members may be re-elected for a second four-year period.

The original supervisory mechanism of the ICESCR Committee is the reporting procedure which required States parties to present periodic reports to the ECOSOC through the UN Secretary-General, on the actualisation of the rights recognised in the Covenant.⁴⁵

The ICESCR also has an Optional Protocol which provides for both individual and collective complaints mechanisms which was first adopted by the Human Rights Council, and later by the UN General Assembly on 10th December 2008, to coincide with the 60 years of the Universal Declaration of Human Rights. This Optional Protocol provides for three supervisory mechanisms for the ICESCR Committee: a) inter-state complaint procedure (Article 10); b) individual and collective complaints mechanism (Articles 1 and 2); and c) inquiry procedure (Article 11).

This thesis explores these provisions to show that international law provides globalized legislative mechanism for the promotion and enforcement of socio-economic rights

⁴⁵ See Articles 16 to 21 ICESCR.

which are core to sustainable guarantee of human rights including women's right to dignity. The non-justiciability of socio-economic rights in the Nigerian Constitution and their non-judicialization by Nigerian Courts, unlike in India and South Africa justifies why this thesis seeks valuable lessons from the legal framework of those countries to bridge the gaps in the Nigerian framework.

2.2.5 Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment

The Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, 1984 is also commonly referred to as the Convention Against Torture (CAT).

It is a multilateral UN instrument for the prohibition of torture, cruel, inhuman or degrading treatment or punishment. The arrangement and structure of the Convention follows the pattern of the UDHR, ICCPR and the ICESCR.⁴⁶ The convention was adopted and opened for signature and ratification 10th December 1984 by General Assembly resolution 39/46. It entered into force on 26th June 1987, *vide* its article 27 (1).⁴⁷

Article 1.1 of the CAT defines torture as follows:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or

⁴⁶ It has three parts, a preamble and thirty three articles.

⁴⁷ UN Human Rights, Office of the High Commissioner for Human Rights. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. (9/3/2014).

other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

It is thus arguable from the definition of *torture* in this convention that all manner of degrading, inhuman and exploitative cultural practices and attitudes against women in Nigeria, India,⁴⁸ South Africa and elsewhere are unlawful and prohibited by international law since they are perpetrated “*for any reason based on discrimination of any kind.*”⁴⁹ This would include obnoxious widowhood rites, wife confinement, widow inheritance, wife donation, forced marriages, spousal rape, female genital mutilation, abusive threats and attitudes as well as psychological torture arising from childlessness or son preference.

Its Article 2 enjoin parties to take “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory” within their control or jurisdiction and to ensure that all such acts of torture are criminalized⁵⁰ and prosecuted whether they are committed by or against its own citizens.⁵¹

Article 8 of the Convention makes torture an extraditable offence and states are further permitted under Article 5 to establish a universal jurisdiction under which non-extraditable torturers can still be brought to trial. It also prohibits the use of any evidence obtained by torture in any trial.⁵²

According to Kofi Annan,

...the responsibility to protect imposes duties on both sides. Duties on the government concern to protect its own people. But it also imposes duties on the rest of us, that we cannot sit back and do nothing. We cannot sit back and say that is the sovereign duty of that and that government or because of the sovereignty we cannot interfere. Some crimes are so shameful and so

⁴⁸ India signed the Treaty on 14th October 1997 while Nigeria signed it on 28th July, 1988 and ratified it on 28th June, 2001.

⁴⁹ Article 1.1 of the Convention Against Torture, 1984.

⁵⁰ Article 4 of the Convention Against Torture.

⁵¹ Article 5

⁵² Article 15

painful that each and every one of us has to ask the question “What can we do?” And sometimes, I think, it is enough for us to say ‘We can't take this anymore.’⁵³

Article 9 enjoins states to provide and share mutual evidence and sensitive information which will offer “the greatest measure of assistance” for the prosecution of offences which violate the Convention. Torture allegations must also be investigated timeously⁵⁴ and right of torture victims to compensation and redress must be guaranteed and enforced.⁵⁵

However, Article 3.1 of the Convention prohibits the deportation, extradition or *refouling* of people to a country where there are strong indications that they will be tortured.⁵⁶

Article 16 mandates parties to take every necessary measure prevent other acts of cruel, inhuman or degrading treatment or punishment within its jurisdiction or area of control.

Specifically, the said Article 16 provides that:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

⁵³ Kofi A. Annan (2008) “*Establishing a Culture of Prevention*” The Anna Lindh Lecture, Raoul Wallenberg Institute, University of Lund, Sweden. 2 October 2008. <http://rwi.lu.se/old/publicseminars/annalindh/lecture08.pdf> page 5.

⁵⁴ Articles 12 and 13

⁵⁵ Article 14

⁵⁶ The article 3.1 provides that. “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

It is most humbly submitted that the phrase “when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” in article 16 should be interpreted in such a manner as to cover and include inhuman, degrading punishment and cultural exploitations which violate the human rights of women particularly in Nigeria and India. This is more so, bearing in mind the meaning of *Violence against Women* which, according to the Beijing Declaration and Platform for Action, 1995, means:

Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.⁵⁷

There is also *The Committee against Torture*, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment and which is empowered under Article 20 to investigate allegations of systematic torture. The author hereby submits that Article 20 should at all times be interpreted to cover such mental and psychological torture arising from cultural exploitation of women which is common in Nigeria, India and South Africa.

Article 22 obliges state parties to recognize the power of the Committee against torture to receive and hear complaints from individuals or non-state parties alleging violations of the Convention by a party, insofar as the *same matter* is not pending before another international adjudicatory body. Thus in *ARA v Sweden*⁵⁸, the complainant was a Sri Lankan who was awaiting deportation from Sweden to Sri Lanka. Although his claim did not invoke any specific articles of the Convention (probably because he was not represented by counsel), it however raised issues of deportation and *refoulment* under

⁵⁷See para. 113(c) of the Beijing Declaration where violence against women was expressed to include “(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.” <http://www1.umn.edu/humanrts/svaw/law/un/undocs.htm> (26/9/2013).

⁵⁸ Communication No: CAT/C/38/D/305/2006 of May 1, 2007 (initial submission on 25 September 2006).

article 3 of the CAT. The complainant had applied for political asylum in Sweden alleging that he feared persecution, torture or death by the ruling government which his family had long opposed. His application was roundly rejected by the Migration Board and the aliens Appeals Board between 14 September 2004 and 31 May 2006 because in their opinion, 'Sri Lanka is a democratic state where the judicial system works well.' In reply to the communication, the state party argued that the complaint was inadmissible under Article 22 paragraph 5, sub paragraph (a) of the Convention since the same complaint is *being examined* and pending before the European Court of Human Rights as Petition No. 8594/04. And more so, that the European Court of Human Rights did not make any interim orders of protection in relation to the deportation order. The complainant confirmed this but alleged that the matter was being unnecessarily delayed. Accordingly, the Committee against torture decided that the complaint was inadmissible.⁵⁹

This thesis explores these provisions to show that international law provides globalized legislative guide to enable states protect women against various acts of torture, inhuman or degrading treatment, commonly manifest in certain obnoxious socio-religious mythologies, traditional widowhood rites and cultural practices which humiliate, dehumanize, degrade and diminish women's right to equality and dignity, especially in Nigeria and India.

2.3 Thematic Human Rights Documents

It must also be noted that within the context of this thesis, women are considered as disproportionate and particular victims of certain specific cultural exploitations as well as human rights violations such as degradation, trafficking, rape, sexual exploitation and dehumanising cultural practices. The United Nations addresses such violations through

⁵⁹ United Nations, CAT. CAT/C/38/D/305/2006. (*Jurisprudence*) (Translated from its original Spanish to English). <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/318c0b6ba6c1de07c12572f10025d5e6?Opendocument>. (2/4/2014).

certain conventions and treaties known as thematic human rights documents. These thematic documents are usually drafted by specialized United Nations agencies responsible for addressing the particular human rights abuse or violation in question.

However, with particular reference to cultural exploitation of women in Nigeria and India, including child marriages, marital rape and other violations of women and girls arising from widowhood rites, traditional myths and mind-sets, son-preference, dowry-related violations and allied cultural practices, specific thematic human rights documents relating to women are reviewed. They include, the Convention on the Rights of the Child, 1990; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979 (with General Recommendation 19 of 1992 and its Optional Protocol of 2000); Declaration on the Elimination of Violence Against Women (DEVAW) 1993 and the Rome Statute of the International Criminal Court, 1998 (effective July 1, 2002) under which rape is declared a *crime against humanity*.

In addition to these, the Beijing Declaration and Platform for Action (1995 Fourth World Conference on Women, Beijing) and the Commission on the Status of Women (CSW) will also be reviewed.

2.3.1 Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (UNCRC) is an international human rights treaty which recognizes over 40 substantive rights of children and young people, aged 17 and below, all over the world.⁶⁰ So far, the UNCRC is the most widely ratified international human rights treaty globally, as well as the only international human rights treaty to encompass the rights and freedoms (civil, political, economic, social and cultural rights) of persons below the age of eighteen. It elaborately spells out the basic needs of every child which includes a safe, happy and fulfilled childhood

⁶⁰ Article 1 of the Convention defines a 'child' as a person below the age of 18, and urges states to raise the age of majority in their jurisdictions if it falls below 18 years so as to afford greater protection for the world's children.

without discrimination as to sex, religion, social origin, as well as place or status of birth.⁶¹ The Convention was adopted by the UN General Assembly on 20 November 1989, after more than a decade of negotiations.⁶²

Although this thesis relates directly to the dignity of women against sexual abuse, the essence of reviewing the Convention on the Rights of the Child (UNCRC) here is to show that similar violations of dignity and sexual freedom suffered by the girl child also amounts to gross violation and abuse of women's rights in international law.

In Article 2, the Child Rights Convention prohibits any form of discrimination against children for whatever reason. Article 2.2 specifically enjoin state parties to the Convention to "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

According to UNICEF,

The Convention applies to all children, whatever their race, religion or abilities; whatever they think or say, whatever type of family they come from. It doesn't matter where children live, what language they speak, what their parents do, whether they are boys or girls, what their culture is, whether they have a disability or whether they are rich or poor. No child should be treated unfairly on any basis.⁶³

The Convention was adopted and opened for signature, ratification and accession on November 20, 1989 by General Assembly Resolution 44/25, and it entered into force on September 2, 1990 *vide* its article 49. It has a preamble and 54 articles. Only the articles

⁶¹ United Nations Convention on the Rights of the Child (UNCRC), Children and young people. <http://www.education.gov.uk/childrenandyoungpeople/healthandwellbeing/b0074766/uncrc>. (10/3/2014). All United Nations member states have ratified the convention except the United States and Somalia.

⁶² Unicef Malaysia, http://www.unicef.org/malaysia/about_crc.html. (29/10/2014).

⁶³ FACT SHEET: A summary of the rights under the Convention on the Rights of the Child, http://www.unicef.org/crc/files/Rights_overview.pdf (11/3/2014).

relating to the child's right to life,⁶⁴ best interests,⁶⁵ genital integrity and circumcision,⁶⁶ decision making,⁶⁷ forced marriages, reproductive and foetal rights,⁶⁸ child-selling and trafficking,⁶⁹ right to proper and responsible education and vocation⁷⁰ will be reviewed in this section.

Circumcision or female genital mutilation is a cultural exploitation of the girl child and an invasion of her feminine honour and privacy. It is an unhygienic and unscientific traditional practice which is simply based on mythology. The practice is a breach of the right protected in Article 16 of the Convention on the Rights of the Child, which provides that "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, or to unlawful attacks on his or her honour and reputation." Under article 16.2, the child is also entitled to legal protection against any such invasion or interference.

Article 19 similarly provides that,

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

This practice also offends Article 37(a) which prohibits torture or other cruel, inhuman or degrading treatment or punishment of the child.

⁶⁴ Article 6.1

⁶⁵ Article 3.1 provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." See also article 9.

⁶⁶ Article 16

⁶⁷ Article 12

⁶⁸ Article 36

⁶⁹ Article 35

⁷⁰ Articles 28-29

The customary practice of early child-marriage is synonymous with sexual exploitation and abuse of the girl child and a gross violation of Articles 34, 36 and 37 of the Convention on the Rights of the Child.

Article 34 contains the undertaking by States Parties to “take all appropriate national, bilateral and multilateral measures” to protect the child from all forms of sexual abuse and exploitation and to prevent her from prostitution, pornography or coercion or inducement in any unlawful sexual activity.⁷¹

In some Nigerian and Indian societies, customary law recognizes the *godhood* of man and encourage son-preference, even though certain Islamic teachings abhor them.⁷² This often leads to the unlawful abortion of the female foetus as well as the selling, killing or abandonment of girl-children. This obnoxious cultural practice violates Article 36 of the Convention which under which contains a blanket mandate on States Parties to “*protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.*” It is also contrary to Article 35 of the Convention which mandates States Parties to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

It must however be mentioned in summary, that international law provides adequate protection of the girl-child against cultural exploitation of the girl-child and also

⁷¹ Two new Optional Protocols to the Convention including The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography were adopted on 25th May 2000 and entered into force on 18th January 2002. These Optional Protocols supplement the Child rights Convention by including provisions for criminalising violations of Article 34 of the Convention prohibiting the “sale of children, child prostitution and child pornography”. The Protocol defines ‘sale of children’, ‘child prostitution’ and ‘child pornography’ and sets the criteria for addressing violations under domestic law, both in relation to the prosecution of offenders, prevention of the offences and the protection of victims. <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightskonceptsideasandfora/humanrightsfora/theunitednations/>. (12/3/2014).

⁷² The teachings of Prophet Muhammad (Pbuh) and certain parts of the Qur’anic verse are opposed to son preference and gender inequity: (a) If a man to whom a girl is born neither buries her alive, humiliates her, nor gives his sons preference over her, he will be allowed to enter heaven by God, as a reward. (Abu Dawud, Sunan, Kitab al-Adab, 4/337). (b) Live with them on a footing of kindness and equity. If you take a dislike to them, it may be that you dislike a thing which God has meant for your own abundant good. (Qur’an 4: 19). Also, in the foreword to his book, **Woman in Islamic Shari’ah**, the learned Islamic cleric wrote that, “To interpret the Islamic concept of woman as “degradation” of woman is to distort the actual issue. Islam has never asserted that woman is inferior to man. It has only made the point that woman is differently constituted.” (See Maulana Wahiduddin Khan: *Woman in Islamic Shari’ah*, 2000, The Islamic Centre, New Delhi. p. 11).

encourages governments to assist indigent families and guardians to secure children's "right to a standard of living that is good enough to meet their physical and mental needs."⁷³

2.3.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (with General Recommendation 19 of 1992 and Optional Protocol of 2000)

Following exploitation, discriminations and prejudices against women, in spite of the clear provisions and the preamble to the Universal Declaration of Human Rights, 1948 and other international human rights instruments which abhor and prohibit all and any form of gender – based discrimination, the United Nations General Assembly adopted Resolution 34/180 of 18 December 1979 which created the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). The Convention entered into force on 3 September 1981,⁷⁴ and by March 2010, 186 countries (including Nigeria and India) were party to the Convention.⁷⁵

Generally, the CEDAW aims *inter alia*, at improving basic understanding of the concept of human rights, as well as the influence of culture and tradition on women's rights, by emphatically acknowledging that customs, norms and stereotypes give rise to a multitude of legal, political and economic constraints on the advancement of women.⁷⁶ CEDAW, like the rest of the human rights regime, assumes that culture, custom, or religion should not excuse or condone violations of human rights.⁷⁷ It also has an equal universal application whereby countries that ratify it assume the burden of

⁷³ Article 27

⁷⁴United Nations 1980, Doc. 34/180. "Convention on the Elimination of All Forms of Discrimination Against Women: Resolutions and Decisions Adopted by the General Assembly During the thirty fourth session, 18 September, 1979 – 7 January, 1980". Supp. No. 46 (A134/46) New York: United Nations.

⁷⁵ The Nigerian government ratified CEDAW in 1985 without reservations. However, the CEDAW has remained unenforceable in Nigeria because the non-domestication clause in Section 12 of the 1999 Nigerian Constitution.

⁷⁶ UN Division for the Advancement of Women, Published by the United Nations Department of Public Information C DPI/2040 C May 1999. <http://www.un.org/womenwatch/daw/cedaw/cedaw20/ending.htm> (2/4/2014)

⁷⁷ Merry, S. E. (2003). Constructing a Global Law-Violence against Women and the Human Rights System. *Law & Social Inquiry*, 28(4), 941-977, p.945.

conforming to its requirements, regardless of their specific cultural attributes.⁷⁸ The CEDAW is acknowledged as an international bill of rights for women and it focuses on eliminating discrimination against women that violates the principle of equality of rights and respect for human dignity.⁷⁹

The preamble of the Convention also stresses "that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality of men and women". The Convention thus affirms equal responsibilities of both sexes in family life and their equal rights with regard to education and work, and attacks cultural patterns which define the public realm as a man's world, and the domestic sphere as women's domain.⁸⁰

This Convention addresses the rights of women to participate in development, as stakeholders, and the rights of rural women in particular. As such, the CEDAW has been variously described as the most comprehensive and prominent international instrument embracing the special concerns of women, and as "essentially an international bill of rights for women and a framework for women's participation in the development process ... (which) spells out internationally accepted principles and standards for achieving equality between women and men."⁸¹

The Convention is arranged in six parts and it has a preamble and thirty articles. Part 1 contains articles 1-6. In Article 1, it specifically defines the phrase *Discrimination Against women* as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of

⁷⁸ *Id* at 946.

⁷⁹ *Id* at 950.

⁸⁰ UN Division for the Advancement of Women, Published by the United Nations Department of Public Information C DPI/2040 C May 1999. <http://www.un.org/womenwatch/daw/cedaw/cedaw20/ending.htm> (2/4/2014)

⁸¹ J.M. Nasir (Mrs.) – "CEDAW And The Woman Under Sharia" (1999) *CJLJ* Vol. 5 No. 5 p. 20 at 22-24.

equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The basis of CEDAW lies in its Article 2(f) which enjoins States parties:

To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

By acceding to the Convention, parties oblige themselves to implement the measures set forth in the convention for the elimination of all forms of discrimination against women.

Some of these measures include:

- (1) Incorporating into their legal systems, the core principle of equality of men and women.
- (2) Abolition and repeal of all gender repressive or discriminatory laws and replacing them with new ones which do not discriminate against women.
- (3) The establishment of courts, tribunals and other public institutions to ensure that women are effectively protected against all forms of discrimination including those arising from the actions or omissions of institutions or persons, corporate or real.⁸²

Article 4 declares that ‘affirmative action’ and other positive action taken to protect maternity rights will not be considered discriminatory.

The provision of the CEDAW Article 5 is also imperative because it oblige state parties:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the

⁸² CEDAW articles 2 and 3. See also UN WOMEN: United Nations Entity for Gender Equality and the Empowerment of women. <http://www.un.org/womenwatch/daw/cedaw/>. (13/3/2014).

inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

This mandate on states to take every necessary action to modify or jettison those cultural attitudes and patterns which fuel discrimination, and ensure that issues relating to maternity are understood as part of family social life is an acknowledgement that certain discriminations against women, including women in India and Nigeria, are rooted in and perpetuated by culture and cultural patterns.⁸³

Under article 6, states undertake to suppress trafficking in women for whatever illicit purpose as well as exploitation of prostitution of women.

Part II of the CEDAW contains Articles 7 to 9, wherein states are mandated to take appropriate measures to eliminate discrimination and ensure equal rights of men and women participation in politics, governance and public life;⁸⁴ and in the opportunity to represent their governments overseas and serve at international organisations/bodies.⁸⁵ Article 9 enjoins states to ensure that a woman shall not be rendered stateless or compelled to change her nationality as a result of marriage, even if she is married to an alien or to a husband who subsequently changes his own nationality.

Part III (Articles 10 to 14) of the CEDAW Convention enjoins states to take appropriate measures to ensure equality and non-discrimination against women in certain economic issues and social security benefits including education (Article 10)⁸⁶; work, employment, promotion, remuneration, retirement, safe health and working environment including marriage and maternity considerations (Article 11); health care and family planning benefits, pre-natal and post-natal benefits (Article 12); and the right

⁸³ The combined understanding of the definition of *Discrimination Against women* in Article 1 and the provisions of Articles 2 and 5 justifies the quest of this researcher to seek a realistic Framework for Protecting Women's right to dignity and freedom from Cultural Exploitation, particularly in Nigeria and India.

⁸⁴ Article 7

⁸⁵ Article 8

⁸⁶ Article 10.c of the CEDAW specifically mandates the revision of textbooks, school programmes and teaching methods with a view to eliminating stereotyped concepts in the field of education.

to recreation and cultural life as well as to economic benefits such as loan, mortgages and other credit benefits.⁸⁷

Article 14 makes a special case for the benefit of rural women and mandates states to ensure steps towards eliminating all prejudices and discriminations suffered by rural women vis-à-vis their urban counterparts. States are thus enjoined to ensure provision of adequate opportunities for education, training and vocation for rural women, their improved health, economic and environmental conditions as well as the provision of adequate facilities for improved living conditions, especially housing, sanitation, water supply, transport, electricity and communications.

Part IV contains Articles 15 and 16 which emphasizes the equality of women and men before the law particularly in the area of private law, and thus provides that women may own, manage, administer and even dispose of property.⁸⁸

Notably, the CEDAW is the only human rights treaty to mention family planning⁸⁹ and oblige governments to place family planning on the education curriculum⁹⁰ and to develop family codes that guarantee women's rights "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."⁹¹

Article 16 enjoins states to seek to eliminate discrimination against women in relation to marriage, property rights, reproductive rights and family relations. It also declares *betrotal* (child marriage) to be null and void and enjoin states to make legislation in compliance with same.⁹²

⁸⁷ Article 13.

⁸⁸ Article 15

⁸⁹ UN Division for the Advancement of Women, Published by the United Nations Department of Public Information C DPI/2040 C May 1999. <http://www.un.org/womenwatch/daw/cedaw/cedaw20/ending.htm> (2/4/2014)

⁹⁰ Article 10.h

⁹¹ Article 16.e

⁹² Article 16.2

The said Article 16 is very crucial to this subject and is hereby reproduced in *extenso*:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right to freely choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.⁹³

Article 17 of the CEDAW Convention recognizes the CEDAW Committee (Committee for the Elimination of Discrimination Against Women) as the body mandated to supervise non-compliance and compliance with CEDAW. The Committee has 23 members comprising experts in women's affairs, teachers, diplomats and lawyers elected by the states parties to serve a four-year tenure.

The CEDAW Convention has one reporting system or supervisory mechanism,⁹⁴ and its Article 18 requires that within one year of becoming a party, every member state would send report to the Committee of the progress it has so far made in relation to the CEDAW.

Part VI contains Article 23 to 30 and Article 23 creates a provision that where domestic privileges and equality rights contained in the national legislation of States or in any other international instrument are more beneficial to women than the CEDAW provisions, then those national legislation or other international instruments shall prevail over the CEDAW.⁹⁵

⁹³ Source: UN WOMEN: United Nations Entity for Gender Equality and the Empowerment of women. <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>. (14/3/2014).

⁹⁴ However, two additional supervisory mechanisms exists under the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) of 2000.

⁹⁵ **“Article 23** Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

(a) In the legislation of a State Party; or

(b) In any other international convention, treaty or agreement in force for that State.”

2.3.2.1 CEDAW General Recommendation 19 of 1992

This recommendation simply brings gender-based violence (including domestic violence)⁹⁶ as a special subject within the contemplation of ‘discrimination against women’ in Article 1 of the CEDAW by asserting that, ‘gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.’⁹⁷

The recommendation further defines *Gender-based Violence* thus:

6. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.⁹⁸

7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;

⁹⁶ Paragraph 9 of the General recommendation emphasise that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

⁹⁷ Paragraph 1 of Recommendation 19 of 1992.

⁹⁸ Paragraph 6 and 7 respectively.

- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health;
- (h) The right to just and favourable conditions of work.⁹⁹

In its paragraph 11, the CEDAW recommendation was more emphatic on the concept of gender-based violence. It provides that:

Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.

The recommendation also acknowledges that *family violence* and certain exploitation of women and girls including rape and sexual assault¹⁰⁰ are *perpetuated by traditional attitudes*. Its paragraph 23 states thus:

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are

⁹⁹ <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>. (15/3/2014). It must be noted that certain cultural practices in Nigeria and India are exploitative of women's human rights and thus come under the definition of *Gender-based Violence*.

¹⁰⁰ Paragraph 18 of General recommendation 19.

perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.

In paragraph 24, specific recommendations are made for the protection of women against exploitation and rights abuse. They include:

- (a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;
- (b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention; ...
- (e) States parties in their reports should identify the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of violence that result. They should report on the measures that they have undertaken to overcome violence and the effect of those measures;
- (f) Effective measures should be taken to overcome these attitudes and practices. States should introduce education and public information programmes to help eliminate prejudices that hinder women's equality.

This thesis shares the view that although CEDAW general recommendation is not legally binding nor carries the same weight as the main CEDAW text, its contents are

designed to show or explain to states parties their obligations when they are not mentioned or not sufficiently explained in the convention itself.¹⁰¹

2.3.2.2 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Optional Protocol of 2000

The Optional Protocol to CEDAW was adopted at the fifty-fourth Session of the UN General Assembly on 6 October 1999, and it entered into force on 22nd December 2000.¹⁰² As at 13th March 2014, 104 states were parties to the Optional Protocol and 80 have signed it. Nigeria signed the Optional Protocol on 8 September 2000 and ratified it on 22nd November 2004 while India has not done either.¹⁰³

The Optional Protocol has a Preamble and 21 Articles. However, the Articles most relevant to this study are articles 1,2,3,4, 8 and 17 because they directly reflect the crux of the two additional supervisory mechanisms created under the Optional Protocol.¹⁰⁴

First, is the individual Complaints Mechanism in Articles 1 to 4.

Article 1 of the Optional protocol is a commitment by State parties to submit to the jurisdiction of the CEDAW Committee, while Article 2 provides for an individual complaints mechanism (known as Communication Procedure), which allows individual or groups of women, to submit claims to the CEDAW Committee and seek redress for violations of rights protected under the CEDAW. Where the Communication is being made on behalf of any party, it must be with the full consent of that party or with cogent reason(s) as to why the consent was not obtained. The Protocol states further that

¹⁰¹ Merry, S. E. (2003). Constructing a Global Law-Violence against Women and the Human Rights System. *Law & Social Inquiry*, 28(4), 941-977, p.952.

¹⁰² 22 December 2000, No. 20378. In accordance with article 16(1) (see paragraph 16 of Resolution A/RES/54/4).

¹⁰³ However, the application and enforcement of the CEDAW (with its Optional Protocol) in Nigeria is hindered by the Non-domestication clause in Section 12 of the 1999 Nigerian Constitution. It is for this reason that Nigeria's Minister of Women Affairs and Social Development, Hajia Zainab Maina, expressed worries on 14th September, 2013 over the failure of the National Assembly to domesticate the CEDAW. <http://http.nguardiannews.com/national-news/132759-minister-decries-non-domestication-of-cedaw-gender-bil>. (14/3/2014).

¹⁰⁴ UN WOMEN: United Nations Entity for Gender Equality and the Empowerment of women. <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>. (14/3/2014).

individual communications can only be admitted if it is in writing, signed and concerns a state which has become party to the CEDAW Protocol,¹⁰⁵ and provided also that all domestic remedies had been exhausted.¹⁰⁶

The second is the inquiry procedure established by Article 8 of the Optional Protocol, under which the CEDAW Committee may *suo motu*, “initiate a confidential investigation by one or more of its members where it has received reliable information of grave or systematic violations by a State Party of rights established in the Convention.”

In undertaking such confidential investigation, the CEDAW Committee may, with the consent of the state party concerned, visit it physically, after which any of its findings, comments or recommendations will be transmitted to the said party, to which it may respond within six months.¹⁰⁷

The Protocol includes an ‘opt-out clause’, allowing states upon ratification or accession to declare that they do not accept the inquiry procedure.¹⁰⁸

Article 17 of the CEDAW Protocol provides that there shall be no reservations to the Protocol.

One of the individual communications so far heard by the CEDAW Committee under this Optional Protocol is *Szijarto v. Hungary*.¹⁰⁹ In that communication, the author went into labour pain, broke her amniotic fluid and experienced heavy bleeding on 2 January 2001. She was driven in an ambulance to Fehérgyarmat Hospital, about one hour away.

¹⁰⁵ Article 3, CEDAW Protocol.

¹⁰⁶ Article 4 of the CEDAW Optional Protocol. The entry into force of the Optional Protocol places the CEDAW at par with ICCPR and CAT, which also have individual complaints mechanisms.

¹⁰⁷ Article 8, CEDAW Protocol.

¹⁰⁸ A similar inquiry procedure exists with respect to Convention Against Torture (CAT).

¹⁰⁹ Communication No. 4/2004, submitted on 12 February 2004. The Committee’s views under article 7, paragraph 3, of the CEDAW Optional Protocol was made on 14 August 2006. <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/internationalcases/committeetheeliminationofdiscriminationagainstwomen/nr/2522>. (12/3/2014).

Upon quick examination, the doctor found that the foetus had died in her womb and informed her that a caesarean section was urgently required to remove the dead foetus. And while on the operating table, she was handed a consent form to sign for the caesarean section and she did. She was also made to sign a barely legible note handwritten by the doctor and added to the bottom of the form, which read: *“Having knowledge of the death of the embryo inside my womb I firmly request my sterilization.”*¹¹⁰ *I do not intend to give birth again; neither do I wish to become pregnant.”* The doctor and the midwife counter-signed the same form. The patient also signed statements of consent for a blood transfusion and for anaesthesia. Hospital records also showed that within 17 minutes of the ambulance arriving at the hospital, the caesarean section was performed, the dead foetus and placenta were removed and the patient’s fallopian tubes were tied. However, before leaving the hospital the patient requested from the doctor, information on her state of health and when she could safely have another baby. It was just then that the doctor explained the meaning of the word ‘sterilization’ to her.

The patient was aggrieved and filed this communication before the CEDAW Committee, alleging discrimination and gross violation of her rights, having been denied informed consent to sterilization which is a standard requirement of both international human rights law and domestic law, and derives from respect for a woman’s human rights as laid down in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, in Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.

After listening to the arguments of the parties, the CEDAW Committee, acting under article 7, paragraph 3 of the Optional Protocol to the Convention on the Elimination of

¹¹⁰ A Latin term unknown to the patient was used instead of the simple English word “Sterilization”.

All Forms of Discrimination against Women, concluded that the instant facts constitute a violation of the patient's rights guaranteed in articles 10 (h): (right of access to specific information and advice on health and family planning); article 12: (obligation of States to take all appropriate measures to ensure equality of men and women and eliminate discrimination against women in relation to health care services, pregnancy and family planning) and article 16 paragraph 1(e): (reproductive rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights) of the CEDAW Convention by the state of Hungary, acting through the hospital.

2.3.2.3 Substantive Commitment of States to CEDAW

It is important to examine the various levels of commitment which Nigeria, India and South Africa make to CEDAW.

So far, Nigeria has no official commitment to CEDAW and the Nigerian courts are not bound to apply or enforce the CEDAW provisions. This is a result of the non-domestication provision contained in Section 12 of the 1999 Nigerian Constitution, coupled with the fact that the CEDAW has not been domesticated as part of the laws of the Federation of Nigeria. It is for this reason that the Nigerian representative to the CEDAW Committee has said that Nigeria is notorious for abandoning and ignoring international agreements.¹¹¹

This is a disregard of the *pacta sunt servanda* in Article 26 of the Vienna Convention on the law of Treaties which provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith" as well as the provisions of Article 27 of the convention which provides thus: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

¹¹¹ Nwankwo, O. (2013). "Nigeria is notorious for violating international agreements." Lagos, Nigeria, Nigerian vanguard Newspaper.

In India, the Constitution does not specifically and positively mandate Courts to apply the CEDAW or other allied international instruments, even though its Article 51 (c) provides that “The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with one another.” However, the CEDAW is still made applicable and enforceable as a result of the judicial creativity and activism of the Indian Supreme Court as was manifest in the court’s rationale for the formulation of the celebrated *Vishaka Guidelines*.¹¹²

As for South Africa, there is a positive mandatory constitutional commitment to international law generally, and not just to CEDAW. Section 39(1) of the South African Constitution provides that “When interpreting the Bill of Rights, a court, tribunal or forum- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law.

2.3.3 Declaration on the Elimination of Violence Against Women (DEVAW)

The Declaration on the Elimination of Violence against Women (DEVAW) was adopted at the 85th plenary meeting of the UN General Assembly by Resolution A/RES/48/104 of 20 December 1993. It has a long preamble and six articles.

It was the first international human rights instrument adopted by the United Nations which specifically addresses violence against women. Even though DEVAW is not a binding treaty, it is still a source of international law and applies to all UN member states.

The Declaration was made in recognition of “the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings” and bearing in mind that “those rights

¹¹² It is hereby restated for emphasis and clarity that in justifying the rationale for formulating the Vishaka Guidelines, the Supreme Court (per Verma, CJI in *Vishaka and others v. State of Rajasthan & Ors* (JT 1997 (7) SC 384); AIR 1997 SC 3011).stated *inter alia* that India was a signatory to the CEDAW and therefore must be bound by it whether or not its provisions are replicated in a national legislation.

and principles are enshrined in international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.”¹¹³

The DEVAW holds violence against women as an obstacle to the achievement of human equality, development and global peace and encourage States to take necessary measures to combat such violence. It also recognizes that violence against women represents the historical reality of inequality in power relations of women and men, which encourage the domination of women by men, thus forcing women into subordination¹¹⁴ and that states should not invoke custom, religion, or culture to limit their obligations.¹¹⁵

It further recognizes *inter alia*, that women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence and urge states to take appropriate measures to secure legal, political, social, and economic equality for women in their countries as a matter of human rights and fundamental freedoms.¹¹⁶

Article 1 of the Declaration defines the term "violence against women" to mean,

Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

¹¹³ United Nations General Assembly. <http://www.un.org/documents/ga/res/48/a48r104.htm>. (15/3/2014).

¹¹⁴ See preamble to the DEVAW.

¹¹⁵ Merry, S. E. (2003). Constructing a Global Law-Violence against Women and the Human Rights System. *Law & Social Inquiry*, 28(4), 941-977 at 946.

¹¹⁶ Article 3.

Most importantly, Article 2 covers other aspects of violence against women which includes:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.¹¹⁷

Summarily, DEVAW underscores that violence (including violation of women's dignity) occurs both in "private or public life" and therefore condemns the unequal and popular socio-cultural construct by which women are forced into subordination and treated less than men. Importantly too, its Article 4 encourages states to take certain specific steps to address these violations and exploitations which constitute domestic violence. These steps include capacity building to train law enforcement personnel, promote research and management of databases on domestic violence cases, facilitation of administrative, political, cultural and socio-legal programs to prevent violence against women, as well as the development of a comprehensive legal system reform whereby all known or perceived acts of domestic violence are investigated and punished.

¹¹⁷ Some of these forms of violence against women constitute cultural exploitation of women or are condoned as a result of traditional, religious or mythological beliefs.

2.3.3.1 The Vienna Declaration and Platform for Action (VDPA), 1993

The Vienna Declaration and Platform for Action (VDPA) is the outcome of the 1993 UN World Conference on Human Rights, held in Vienna, Austria.¹¹⁸

Article 5 of the Vienna Declaration affirms that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The Vienna Declaration is significant for a number of reasons, namely;

1. It affirms the universality and inalienability of all human rights and fundamental freedoms as “the birth right of all human beings”, hence, “their protection and promotion is the first responsibility of Governments”¹¹⁹ and also acknowledges that international cooperation is vital to their realisation.¹²⁰
2. It recognizes and emphasizes that the human rights of women and the rights of the girl-child are an important, inalienable, integral and indivisible part of universal human rights, and that the full and equal participation of women in the socioeconomic, political, and cultural life, at the national, regional and

¹¹⁸ The World Conference on Human Rights was held by the United Nations in Vienna from June 14 through June 25, 1993, with representatives of 171 States in attendance. United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, June 25, 1993, 32 I.L.M. 1661, 1663 [hereinafter Vienna Declaration] (reproducing U.N. Doc.A/CONF.157/24 (Part I) (Oct. 13, 1993), at 20-46). The World Conference was the first international conference to be held on human rights in twenty-five years. See Anne Reifenberg, Women Appear Primed For Success at Human Rights Meeting, DALLAS MORNING NEWS, June 14, 1993, at 1A (describing groundwork for 1993 World Conference). This was quoted in Bunch, C. (1990). Women's rights as human rights: Toward a re-vision of human rights. *Hum. Rts. Q.*, 12, 486.

¹¹⁹ In its Part I, paragraph 27, the VDPA states *inter alia* that “Every State should provide an effective framework of remedies and redress human rights grievances or violations.” (This will comprise the administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent and consequential judiciary supported by a legal profession which is sensitive to international human rights law).

¹²⁰ Part 1, paragraph 1.

international levels, as well as the eradication of all forms of discrimination on grounds of sex are core objectives of the international community.”¹²¹

3. It declares further in Part 1, paragraph 18 that Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated by intensified legal effort and through national action and international cooperation in areas such as socioeconomic development, social security, education, and safe maternity and health care.
4. The Convention calls on Governments, NGOs, institutions and intergovernmental organizations to intensify efforts for the protection and promotion of human rights of women and the girl-child including the promotion of all human rights instruments relating to women because women’s rights and gender-based exploitation are legitimate issues of international concern.¹²²
5. It also declares that violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law, and that all such violations especially murder, systematic rape, sexual slavery, and forced pregnancy, require a particular effective international response. Above all, the Convention urges the UN General Assembly to adopt the draft Declaration on the Elimination of Violence against Women (DEVAW) and implored States to combat Violence against Women in accordance with the DEVAW provisions.¹²³

¹²¹ Part 1, paragraph 18.

¹²² Part 1, paragraph 19.

¹²³ Part II, paragraph 38.

This Declaration is so important that in Part 1, paragraph 26 it cautions states to avoid making any reservations with respect to international instruments on the protection and promotion of the human rights of women and the girl-child, thus justifying the instrument as one that is “deeply concerned by various forms of discrimination and violence, to which women continue to be exposed all over the world.”¹²⁴

2.3.4 The Rome Statute of the International Criminal Court

Following the creation of the International Criminal Tribunal for the Former Yugoslavia in the early 1990’s, the UN proposed the creation of a permanent international criminal court. Thus, in 1994, a draft statute for the establishment of a permanent international criminal court was submitted to the UN General Assembly by the International Law Commission. Thereafter, a conference of the UN General Assembly on the Establishment of an International Criminal Court was held in Rome, to “finalize and adopt a convention on the establishment of an international criminal court.” Thus was the adoption on 17th July 1990, of the Rome Statute of the International Criminal Court which established a permanent International Criminal Court (ICC). The Statute entered into force on 1st July, 2002.

The ICC had jurisdiction to try individuals who commit the ‘most serious crimes of concern to the international community as a whole.’ The Rome Statute defines these serious crimes as ‘the crime of genocide; crimes against humanity; war crimes; and the crime of aggression.’

Article 7 (g) of the Rome Statute defines *crime against humanity* as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . . Rape, sexual slavery,

¹²⁴ See part of the Preamble to the Declaration.

enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”

Since, marital rape, albeit not specifically mentioned in Article 7 (g), usually involves aggression, hostility and violence which disproportionately affects married women, this thesis suggests that marital rape be covered under the phrase, “any other form of sexual violence of comparable gravity” in order to accord greater legal protection to wives and place perpetrators within the jurisdiction of the ICC.

So far, no spouse has been brought before the ICC for marital rape but recent reports indict military forces in Myanmar¹²⁵ and the Democratic Republic of Congo¹²⁶ of using rape as weapon of war. This statute significantly globalizes the sanctity of women’s dignity, especially with respect to sexual violations, which is the crux of this thesis.

2.3.5 The Beijing Declaration and Platform for Action, 1995

In certain cultures and societies including Nigeria and India, some females become victims of violence from the time of their conception, that is, before they are born, when expectant parents abort their unborn female foetuses because they hoped for sons instead. Girls are also subjected to such common traditional practices as female genital mutilation, which leave them maimed and traumatized. Sometimes too, the girls are forced into early marriages before they are even physically, psychologically or emotionally ready and mature. Women also become victims of rape, incest, exploitation

¹²⁵ Writing for Reuters, Washington, (Jan, 14, 2014) under the caption, “*Myanmar still uses rape as weapon of war: women's group*”, David Brunnstrom reported that, “A women's group says the military in Myanmar is still using rape as a weapon of war, with more than 100 women and girls raped by the army since a 2010 election brought about a nominally civilian government that has pursued rapprochement with the West. The Thailand-based Women's League of Burma said in a report made available to Reuters that 47 of the cases documented were gang rapes and 28 of the women were either killed or had died of their injuries. It said several victims were as young as eight. The group said the situation showed the need for legal reform in Myanmar, also known as Burma, and for changes to a 2008 Constitution to ensure that the military is placed under civilian control.” <http://www.reuters.com/article/2014/01/14/us-myanmar-military-rape-idUSBREA0D0CA20140114>. (2/3/2014).

¹²⁶ A report in the online US edition of THEWORLDPOST (A Partnership of THE HUFFINGTON POST and BERGGRUEN INSTITUTE ON GOVERNANCE) of 2 March, 2014 stated that in 2011, “The United Nations named two Congolese army colonels who appear to be blocking an investigation of soldiers accused of mass gang-raping at least 47 women in eastern Congo, and said if the attackers are not identified the officers themselves should stand trial for the crimes committed by the troopers under their command. Government troops carried out the mass rapes in the remote and mountainous villages of Bushani and Kalambahiro in North Kivu province from Dec. 31 to Jan. 1, according to witnesses and victims cited in the report from the U.N. human rights office.” http://www.huffingtonpost.com/2011/07/22/congo-mass-rapes-by-gover_n_906624.html (2/3/2014).

and domestic violence which often lead to frustration, life-long trauma, physical deformity, handicap or death.

Researchers agree that rape is a commonly used weapon of war and armed conflict, employed as a strategy to subjugate and terrify entire communities, intimidate them and weaken their resistance to aggression.¹²⁷ The United Nations also reported that soldiers deliberately rape and impregnate women of different ethnic groups in and around the war zones and abandon them to their fate without personal or medical care or economic support.¹²⁸

Research also reveals that during ethnic conflict, rape of “enemy” women and girls have been explicitly ordered, encouraged or tacitly condoned as both a military tactics and a nationalistic policy.¹²⁹ For instance, in former Yugoslavia, refugees described how public raping of women and girls by military actors was systematically used to force families to flee their homeland, thus achieving the goal of ‘ethnic cleansing.’¹³⁰ It is on this premise that the Platform for Action adopted at the Fourth World Conference on Women, Beijing 1995, declared that rape in armed conflict is a war crime, a crime against humanity and could, under certain circumstances, be considered genocide.

2.3.6 The Commission on the Status of Women (CSW)

Apart from the various United Nations treaties, Conventions and thematic documents for the protection of Women’s rights above discussed, the United Nations also

¹²⁷ Buss, D. E. (2009). Rethinking ‘rape as a weapon of war’. *Feminist legal studies*, 17(2), 145-163; Diken, B., & Laustsen, C. B. (2005). Becoming abject: Rape as a weapon of war. *Body & Society*, 11(1), 111-128; Farwell, Nancy. "War rape: New conceptualizations and responses." *Affilia* 19, no. 4 (2004): 389-403.

¹²⁸ United Nations, Outreach Programme on the Rwanda Genocide and the United Nations. *Background Information on Sexual Violence used as a Tool of War*. <http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml> (29/12/2015). United Nations Department of Public Information DPI/1772/HR--February 1996.

¹²⁹ Shana Swiss, MD and Joan Giller, MB, “Rape as a Crime of War: A Medical Perspective” JAMA (The Journal of American Medical Association) August 4, 1993, Vol. 270, No. 5, p. 613. <http://www.womens-rights.org/Publications/JAMA%2093.pdf>. (3/3/2014).

¹³⁰ *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, Geneva, Switzerland: United Nations; 1993, United Nations document E/CN. 4/1993/50.

established the Commission on the Status of Women (CSW). The CSW was established in 1946 by Resolution 11(II) of the Economic and Social Council (ECOSOC). It is the United Nations organ dealing specifically with women's issues.

It is the mandate of the CSW to prepare progress reports and recommendations to the ECOSOC on issues bothering on the promotion of women's socio-economic, educational and political rights.

The CSW is the Preparatory Committee and forum for review and evaluation of the implementation of the various UN Conferences on women including the popular Beijing Conference.¹³¹

The CSW is constituted by 45 state members elected by the ECOSOC on the basis of regional and geographical equity to serve for four years. The Commission's annual meeting lasts eight days and holds at the UN headquarters in New York.

The Division for the Advancement of Women (DAW) is also worthy of mention. It is arguably the secretarial arm of the CSW and its programmes are directed towards monitoring the 'Forward-Looking Strategies' developed during the various World Conferences on women. It is the mandate of the DAW to undertake and co-ordinate group and expert meetings as well as thematic research and advisory seminars in line with the focal themes of each session of the Commission on the Status of Women.¹³²

The cumulative significance of highlighting relevant provisions of core international and regional human rights instruments in relation to the protection of the right to dignity of women and girls, is to show that, jointly and severally, women's right to dignity is a contemporary subject of international law which member States are obligated to secure

¹³¹ That is, the 1995 Beijing Fourth World Conference on Women. The Commission also acted as the Preparatory Committee forum and for earlier World Conferences on Women, held 1975 in Mexico, 1980 in Copenhagen and 1985 in Nairobi, Kenya.

¹³² The United Nations, ICELANDIC HUMAN RIGHTS CENTRE. <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightskonceptsideasandfora/humanrightsfora/theunitednations/>. (12/3/2014).

through constitutional, legislative, judicial, as well as law and policy measures. Inherent gaps in the 1999 Nigerian Constitution which holds international law inferior to municipal law under the *non-domestication* provision in Section 12; whereby courts are not obliged to apply international law; the non-justiciability of socio-economic rights, and the manifest lack of judicial creativity and activism (unlike the practice in India and South Africa), justifies why this thesis draws valuable lessons from India and South Africa to bridge the gaps in the Nigerian framework for the protection of the right to dignity of women.

2.4 Substantive Obligation of States to International Human Rights Law

Generally speaking and as earlier mentioned in the introduction to this chapter, member states of the United Nations have three-pronged substantive obligations with respect to the enforcement of international human rights law, namely: Obligation to Respect, Obligation to Protect and Obligation to Fulfil.¹³³ In the landmark case of *F (Applicant) v. Minister of Safety and Security & 5 Ors*,¹³⁴ the Constitutional Court of South Africa listed the three obligations as “respect, protect and promote” when it explained that in determining whether the Minister of Safety and Security should be held vicariously liable for damages arising from the brutal rape of a thirteen year old girl by a policeman on standby duty, “the state’s constitutional obligations to *respect, protect and promote* the citizen’s right to dignity, and the freedom and security of the person would have to be taken into account.”

These obligations equally take away from nation states the choice or discretion to abide or not to abide by international law and underscores why international law is used as template to measure states’ commitments to human rights protection. But even at that,

¹³³ De Schutter, O. (2010). *International human rights law: cases, materials, commentary*: Cambridge University Press.

¹³⁴ CCT 30/11 [2011] ZACC 37 (Heard on 4 Aug 2011, Decided on 15 Dec 2-11). Note however, that the Minister of Safety and Security, as cited in these proceedings, has been renamed the Minister for Police.

the call has been reiterated¹³⁵ for the establishment of a World Court of Human Rights (similar to the Council of Europe, the Organization of American States and the African Union which have adopted a major human rights treaty and established a regional court with the function of handing down binding judgments on individual complaints), if the United Nations is to be taken seriously as ‘a meaningful human rights protection system’ for the global enforcement of rights and punishment of violators of international human rights law,¹³⁶ because according to him, ‘human rights without a remedy are like the United Nations without Jakob Möller: an empty promise.’¹³⁷

It is essential and axiomatic that states remain primarily responsible in international law for enforcing the protection of human rights within their jurisdictions.¹³⁸

For instance, Paragraph I of part 1 of the 1993 Vienna Declaration and Program of Action states thus:

The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.

According to Manfred Nowak,

The realisation of economic, social and cultural rights is today considered as important as respect for civil and political rights. This synthesis between the two main categories of human rights emanating from the formerly antagonistic human rights concepts is no longer in question, and human

¹³⁵ Nowak, M. (2014). The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights. *Nordic Journal of Human Rights*, 32(1), 3-17.

¹³⁶ Nowak, M. 2009. “Eight Reasons Why We Need a World Court of Human Rights.” In *International Human Rights Monitoring Mechanisms – Essays in Honour of Jakob Th. Möller* (2nd edn), edited by G. Alfredsson, J. Grimheden, B. G. Ramcharan, and A. de Zayas, 697–706. Leiden; Boston: Martin Nijhoff). The author rightly argues that “All regional organisations with any meaningful human rights protection system, i.e. the Council of Europe, the Organization of American States and the African Union, have adopted a major human rights treaty and established a regional court with the function of handing down binding judgments on individual complaints.” He specifically referred to the European Convention on Human Rights 1950 with a permanent and full-time European Court of Human Rights in Strasbourg; the American Convention on Human Rights 1969 with an Inter-American Court of Human Rights in San José; and the African Charter of Human and Peoples’ Rights 1981 with an African Court of Justice and Human Rights in Arusha, created by an Optional Protocol of 2008.

¹³⁷ Nowak, M. (2014) *op.cit* at 10.

¹³⁸ Dada, J. A. (2013). “Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal.” *Journal of Law, Policy and Globalization* 10: 1-18 at 2.

rights have achieved an undisputed status as the only universally recognised value system of our time. Every state in the world has recognised as legally binding at least a few of the core UN human rights treaties.¹³⁹

However, while the respect and obligation to enforce international law is obligatory in the determination of matters relating to fundamental rights and the Bill of Rights,¹⁴⁰ under the provision of Section 39 of the South African Constitution and Article 51 (c) of the Indian Constitution¹⁴¹ as well as by the judicial activism of the Indian Supreme Court¹⁴² respectively, this is not so in Nigeria *vide* Section 12 of the 1999 Nigerian Constitution.¹⁴³

2.5 Critique of the International Framework for the Protection of Women's Right to Dignity

There are currently three functioning regional human rights systems across the world. These are the European, the Inter-American and the African systems. All these have institutions established to spearhead the promotion and protection of human rights within the respective regions. The European system has one-tier institutional machinery of a regional human rights court whereas the Inter-American and the African systems have two-tiered institutional machinery of regional human rights commissions and courts.¹⁴⁴

The one fundamental gap inherent in all UN international human rights instruments therefore is the inability of the United Nations to actually redress human rights

¹³⁹ Nowak, M. (2014). The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights. *Nordic Journal of Human Rights*, 32(1), 3-17., p. 8

¹⁴⁰ Section 39 of the South African Constitution provides that "(1) When interpreting the Bill of Rights, a court, tribunal or forum- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law. (Underlined for emphasis).

¹⁴¹ Article 51 (c) provides that "The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with one another."

¹⁴² In justifying the rationale for formulating the celebrated Vishaka Guidelines, the Supreme Court stated *inter alia* that India was a signatory to the CEDAW and therefore must be bound by it whether or not its provisions are replicated in a national legislation. (per Verma, CJI in *Vishaka and others v. State of Rajasthan & Ors* (JT 1997 (7) SC 384); AIR 1997 SC 3011).

¹⁴³ This Section precludes courts from applying foreign and international treaties unless they are domesticated into local legislation by the National Assembly. An elaboration of this assertion is made in the discussion on the regional framework in the later part of this chapter as well as in Chapter 3 following.

¹⁴⁴ Bogale, B. (2014). Regional human rights institutions: a comparison of the European and the African human rights systems. *East African Journal of Peace and Human Rights*, 20(1), 44-67.

violations. This is primarily due to the absence of a permanent World Court of human rights.¹⁴⁵ This gap cuts across all human rights including the right to dignity of women and for this singular reason the UN is perceived as a toothless bulldog that provides more of principles an absolutely nothing in sustainable remedies and redress. The most authoritative proponent of this call is erudite UN administrator Manfred Nowak who gave eight reasons why a World Court of Human Rights remains the main solution to bridge inherent gaps in the international framework for the global protection of human rights generally.¹⁴⁶ Nowak who has proposed that the UN needs to follow the examples of the European, American and African regional human rights systems, each of which has a permanent court which receives individual, group and state complaints and accordingly adjudicate and exercise unlimited jurisdictions over individual, group and state violators of international human rights.¹⁴⁷

2.5.1 The Way Forward

The most consequential threat to the protection of women's dignity and human rights generally in international law is the inability of the United Nations system to positively enforce punishment against individual and state violators of human rights. This is due to the absence of a permanent World Court of Human Rights, unlike what obtains in the European, American and African regional human rights systems,¹⁴⁸ namely, the European Court of Human Rights (ECtHR),¹⁴⁹ the Inter-American Court of Human

¹⁴⁵ Nowak, M. (2014). The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights. *Nordic Journal of Human Rights*, 32(1), 3-17.; Nowak, M. 2009. "Eight Reasons Why We Need a World Court of Human Rights." In *International Human Rights Monitoring Mechanisms – Essays in Honour of Jakob Th. Möller* (2nd edn), edited by G. Alfredsson, J. Grimheden, B. G. Ramcharan, and A. de Zayas, 697–706. Leiden; Boston: Martin Nijhoff.

¹⁴⁶ Nowak, M. 2009. "Eight Reasons Why We Need a World Court of Human Rights." In *International Human Rights Monitoring Mechanisms – Essays in Honour of Jakob Th. Möller* (2nd edn), edited by G. Alfredsson, J. Grimheden, B. G. Ramcharan, and A. de Zayas, 697–706. Leiden; Boston: Martin Nijhoff.

¹⁴⁷ Nowak, M. (2014). The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights. *Nordic Journal of Human Rights*, 32(1), 3-17.

¹⁴⁸ Nowak, M. (2014). The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights. *Ibid.*

¹⁴⁹ The European Court of Human Rights (ECtHR) is an international court established in 1959 to monitor respect for human rights among the member States of the Council of Europe. The Court is based in Strasbourg, France and it exercises jurisdiction over individual or state members alleging violations of the civil and political rights set out in the European Convention on Human Rights. (See Migration and Human Rights, Council of Europe. http://www.coe.int/t/democracy/migration/bodies/echr_en.asp (26/12/2015)). The European Court of Human Rights has delivered thousands of binding judgments which have led governments to alter their

Rights¹⁵⁰ and the African Court on Human and Peoples' Rights (ACHPR) respectively.¹⁵¹

Erudite UN administrator Manfred Nowak gave eight reasons why a World Court of Human Rights remains the main solution to remedy the inherent gaps in the international framework for the global protection of human rights generally.¹⁵² This researcher agrees wholly with these reasons and arguments because they are resoundingly reasonable, logical, contemporary and authoritative, but further opines with respect, that such a court will particularly protect against violations of the right to dignity of women especially in Nigeria, India and South Africa. It will also put both individual and state violators of the right to dignity of women (by reason of rape/marital rape, sexual abuse, patriarchy, customary law, socio-religious mythology, denial of economic, social and cultural rights or otherwise), on edge especially when they realize,

legislation and administrative practice in a wide range of areas. When the Court find states responsible for human rights abuses, they ask governments to pay compensation to the victims, engage in symbolic measures and effect policy changes in their domestic human rights policies and practices to ensure that the violations do not recur. The Court is therefore a significant agent of positive change, transformation and consolidation of the rule of law and democracy in Europe. (See Hillebrecht, C. (2014). The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change. *European Journal of International Relations*, 20(4), 1100-1123).

¹⁵⁰ At the Inter-American Specialized Conference on Human Rights held in San José, Costa Rica in November 1969, delegates of the member States of the Organization of the American States (OAS) adopted the American Convention on Human Rights, which entered into force on July 18, 1978. To secure human rights in the American continent, the Convention then created two authorities with competence to observe human rights violations: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The Organization of American States established the Court in 1979 to enforce and interpret the provisions of the American Convention on Human Rights. Its two main functions are thus adjudicatory and advisory. Under the former, it hears and rules on the specific cases of human rights violations referred to it. Under the latter, it issues opinions on matters of legal interpretation brought to its attention by other OAS bodies or member states. The first hearing was on June 29 and 30, 1979 at the OAS' headquarters in Washington, D.C. (See History of the Inter American Court of Human Rights, available online at <http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh> (26/12/2015).

¹⁵¹ Although the African Court on Human and Peoples' Rights (ACHPR) is discussed below in this chapter [2.6.2.2], it must however be mentioned that the Court is a regional human rights court established following the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Charter on Human and Peoples' Rights African Court on Human and Peoples' Rights. It entered into force on 25 January 2004. Its role is to enforce compliance with the Charter provisions or provide remedies to victims of human rights violations in Africa. At the ECOWAS sub-regional level, the Economic Commission of West African States (ECOWAS) Community Court of Justice (ECOWAS CCJ) is the adjudicatory body responsible for redressing the violation of human rights within member states including Nigeria. The ECOWAS Court has broad access mechanism which permits aggrieved individuals and NGOs to bypass national courts and file actions directly with the Court.-(See Alter, K. J., Helfer, L. R., & McAllister, J. R. (2013). A new international human rights court for West Africa: the ECOWAS community court of justice. *American Journal of International Law*, 107(4), 737-779).

¹⁵² Nowak, M. (2014). The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights, *op.cit.* at 10.

as in the case of crimes against humanity, that it is only a matter of time before they are brought to justice.¹⁵³ Accordingly, the eight reasons recommended by Manfred Nowak are hereby adopted by this researcher and listed elaborately as follows:

1. *Human rights without a remedy are like the United Nations without Jakob Möller: an empty promise:* As with all other rights, human rights create obligations of others, above all states, and the rights-holders should have a remedy to hold the duty-holders accountable before an independent court. This is the simple logic of rights, duties and accountability.
2. *Final views on communications are nice, but legally binding judgments are simply better:* the language of UN human rights treaties, which use the term “communications” instead of complaints and “final views” instead of “decisions” is simply out dated.
3. *Although the United Nations still maintains a strict separation between East and West, we can't deny it: the Cold War is over:* It is indeed strange that the UN maintains even now an Eastern European Group and a Western and Others Group when most of the former Central and Eastern European states have already joined the EU. The language and spirit of UN human rights treaty monitoring still follows this Cold War spirit.
4. *The United Nations might learn from regional organisations:* All regional organisations with any meaningful human rights protection system, i.e. the Council of Europe, the Organization of American States and the African Union,

¹⁵³ This is in the light of Nowak's Reason No. 7 that '*the Statute of the World Court can be opened for ratification by non-state actors.*' This will make the court indeed a *world court* with unlimited jurisdiction over individuals, groups and state violators of international human rights.

have adopted a major human rights treaty and established a regional court with the function of handing down binding judgments on individual complaints.

5. *The powerful Human Rights Council needs an even more powerful Human Rights Court as independent counterpart:* Although this argument was originally meant in an ironic manner, it even holds more truth today. The Universal Periodic Review mechanism would be an ideal political supervision mechanism for the implementation of the judgments of a future World Court of Human Rights, similar to the supervision of states' compliance with the judgments of the European Court of Human Rights by the Committee of Ministers of the Council of Europe.
6. *The creation of the World Court is easier than we might think and does not even require any treaty amendment:* While other reform proposals, such as replacing the existing treaty monitoring bodies by one standing "super-committee", would require lengthy treaty amendment procedures, the World Court can be established by means of an additional treaty containing the Statute of the Court.
7. *The Statute of the World Court can be opened for ratification by non-state actors:* How we can hold inter-governmental organisations, transnational corporations and other non-state actors accountable for human rights violations constitutes one of the major challenges of international law in the twenty-first century. The creation of the World Court of Human Rights seems to provide a practical solution on the basis of voluntary commitments.
8. *The World Court can enforce the right of victims to adequate reparation:* After long negotiations, the General Assembly in 2005 adopted the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims

of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (GA Res. 60/147 of 16 December 2005). But no mechanisms were developed for the practical implementation of these principles. The World Court could provide a solution. In addition to handing down binding judgments at the global level, the Court could also be empowered to order the respondent party in a legally binding manner to provide adequate reparation to the victims, including restitution, rehabilitation, compensation, legal changes and other forms of satisfaction.¹⁵⁴

2.6 Regional Protection of Women's Right to Dignity in Nigeria and South Africa

This part of the thesis examines the regional instruments for the protection of human rights and invariably, the right to dignity of women in Nigeria and South Africa only. Specifically, these are the African Charter on Human and People's Rights, 1981 (The African Charter) with its Women Protocol to the African Charter on Human and People's Rights (The Women Protocol), the African Commission on Human and Peoples' Rights and the African Human Rights Court. The Chapter also examines the African Charter on the Rights and Welfare of the Child, as well as the commitment of states, that is, Nigeria and South Africa, to the African Charter. Lastly, it makes a critique of the regional framework and suggests the way forward.

2.6.1 Human Rights in India and ASEAN Member States

As for India, the country is not bound by any regional human rights instrument because Asia is strangely, the only region of the world without a regional mechanism for the protection of human rights. This is without prejudice to the still "toothless" ASEAN

¹⁵⁴ See Nowak, M. 2009. "Eight Reasons Why We Need a World Court of Human Rights." In *International Human Rights Monitoring Mechanisms – Essays in Honour of Jakob Th. Möller* (2nd edn), edited by G. Alfredsson, J. Grimheden, B. G. Ramcharan, and A. de Zayas, 697–706. Leiden; Boston: Martin Nijhoff). These reasons are reproduced from Nowak, M. (2014) *op.cit* p.10.

Intergovernmental Commission on Human Rights, ICHR (also known as the ASEAN Charter),¹⁵⁵ which is an advisory body on human rights in South-East Asia founded in the late 2008 but to which India does not also belong.¹⁵⁶ To date there is still no ASEAN Human Rights Court. It is doubtful there will ever be one in the next decade. Generally speaking, the human rights records in the ASEAN member states are poor to begin with. This confirms that in India, the protection of human rights generally and women's dignity in particular, is not regulated by any institution equivalent to the Inter-American Commission on Human Rights and the Inter-American Court; the European Commission on Human Rights and the European Court; or the African Commission on Human and People's Rights.¹⁵⁷

Nonetheless, India parades a formidable and fearless judicial system which, by its creativity and activism, has effectively applied international law to bridge any gaps which may have existed as a result of the absence of a regional human rights mechanism or charter. Human and fundamental rights protection and enforcement in India is discussed *in extenso* in Chapter four of this thesis.

2.6.2 The African Charter on Human and People's Rights, 1981

The African Charter on Human and People's Rights 1981,¹⁵⁸ otherwise known as "The African Charter" is the regional mechanism for the protection and promotion of human rights (including the right to dignity of women) in Africa. It was established under the aegis of the Organisation of African Unity, OAU (now African Union, AU).¹⁵⁹ The

¹⁵⁵ Kelsall, M. S. (2009). The new ASEAN Intergovernmental Commission on Human Rights: toothless tiger or tentative first step? In L. K. Quintana (Series Ed.), *Analysis from the East-West Center* (pp. 1-8). Honolulu, Hawai'i The Asian Pacific Issues Reports on Topics of Regional Concern. This author however concedes that though the ICHR lacks teeth, "the fact that all Ten ASEAN governments agreed to implement a single commission is remarkable and is an essential first step toward ASEAN's stated goal of respecting and protecting human rights." At p.1

¹⁵⁶ The Ten ASEAN member states are Malaysia, Vietnam, Thailand, Singapore, Philippines, Laos, Indonesia, Brunei Darussalam, Cambodia and Burma (Myanmar).

¹⁵⁷ Sidney Jones (1995). Regional Institutions for Protecting Human Rights in Asia. *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 89, Structures Of World Order (April 5-8 1995), pp. 475-480. <http://www.jstor.org/stable/25658967>. (18/10/2014).

¹⁵⁸ *The African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3/Rev.5 (1981).

¹⁵⁹ See article 3(h) of the Constitutive Act of the African Union. At its first meeting in Durban, South Africa, 9–10 July 2002 the African Union decided that the African Commission on Human and Peoples' Rights established by the African Charter on Human

Charter was entered into force on 21 October 1986 and as African member nations, Nigeria and South Africa are bound by its provisions.

South Africa signed and ratified the Charter on 9 July 1996 while Nigeria signed it on 31 August 1982, ratified it on 22 June 1983,¹⁶⁰ and later domesticated it into local legislation as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act cap 10, Laws of the Federation of Nigeria, 1990 or Cap A9, Laws of the Federation of Nigeria, 2004.

The Preamble of the African Charter, like most international agreements, underscores the rationale and prime considerations of the Charter. These include that “freedom, equality, justice and dignity are the essential objectives for the achievement of the legitimate aspirations of the African peoples”¹⁶¹, the obligation of AU member states to eliminate all forms of colonialism in Africa and to direct their efforts towards improving the lot of the African people in line with UN Charter and Universal Declaration of Human Rights,¹⁶² the recognition of the “tradition and the values of African civilisation” as well as “the reality and the respect for peoples’ rights [which] should absolutely guarantee human rights.”¹⁶³

The Charter is precisely arranged thus: “Rights and Obligations” (Articles 1 to 29); “Human and Peoples’ Rights” in Chapter 1 (Articles 1 to 26); “Obligations” in Chapter 2 (Articles 27 to 29) and “General Provisions”, which includes the regulations on the Charter’s ratification and entry into force and the criteria any supplementation. The first section of the Charter contains all the three generations of human rights.

and Peoples’ Rights shall operate within the framework of the African Union, para. 2(xi) of Decision ASS/AU/Dec. 1(I). http://www.who.int/hhr/Human_and_Peoples_rights.pdf. (13/4/2015).

The African Union (AU) came into being to replace the OAU in May 2001 after South Africa deposited its instruments as the 35th member state to ratify the Constitutive Act of the African Union on 23 April 2001. The official launching of the AU later held in Durban, South Africa on 10 July 2002.

¹⁶⁰ See <http://www.achpr.org/instruments/achpr/ratification/>. (10/4/2015).

¹⁶¹ Paragraph 2 of the Preamble.

¹⁶² Paragraph 3 of the Preamble.

¹⁶³ Paragraph 5 of the Preamble.

Remarkably, the Rights contained in the Charter also carry obligations on the individual in relation to the state and in relation to other individuals.¹⁶⁴ Paragraph 6 of the Preamble states *inter alia*, “that the enjoyment of rights and freedoms also entails the assumption of obligations”. No similar provision is contained in the European or Inter American systems.

Article 1 obliges member states to recognise the rights, obligations and freedoms expressed in the Charter and to “to take legislative and other measures pertaining to the implementation” of all rights, obligations and freedoms provided in the Charter.¹⁶⁵

Individual Rights in the Charter are contained in Articles 3 to 18. More specifically, Article 18, Paragraphs I and II relate to the collective rights of the family, while its Paragraphs III and IV includes the rights of women, children, the elderly and the handicapped.

Article 2 guarantees equality and non-discrimination and states that the rights contained in the Charter shall be enjoyed “without any differentiation such as race, ethnic group, skin colour, language, sex, religion, political or other opinion, national or social origin, wealth or other status”.

Article 3 of the African Charter provides for the right of equality before the law and equal protection of the law while Article 4 guarantees the inviolability and respect for human life and integrity.

Article 5 guarantees the Right to human dignity thus:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman and degrading punishment and treatment shall be prohibited.

¹⁶⁴ This arguably underscores the African notion of “brotherhood”.

¹⁶⁵ This is an emphatic obligation on Member States to incorporate the Charter into their various municipal laws.

In addition to civil and political rights, the Charter also codifies Socio-economic and Cultural rights¹⁶⁶ as well as “collective rights” or “Peoples’ Rights”. It is the only human rights instrument which guarantees “Peoples’ Rights” as justiciable rights.¹⁶⁷

The Charter also creates obligations towards other human beings;¹⁶⁸ one’s family, the state¹⁶⁹ and the international community.¹⁷⁰

The Charter is the African version of the UN Human Rights Charter intended to globalize and sustain human rights protection in Africa. Phillip¹⁷¹ described the Charter as “ushering in a new era of recognition of fundamental human rights and freedoms as well as the legal protection of individuals and groups against repression and totalitarianism.” However, it fell short of the strict pattern of the European and Inter-American Human Rights mechanisms which created both Human Rights Commission and Human Rights Courts under the respective Human Rights Conventions.¹⁷² On the contrary, the African Charter had no regional “human rights court” at that time. It however had only the African Commission on Human and Peoples’ Rights which could not enforce compliance with the Charter provisions or provide remedies to victims of human rights violations in Africa because its functions under Article 45 of the African Charter were mainly promotional, protectional and quasi-judicial but basically non-compelling.

¹⁶⁶ Articles 15 to 17.

¹⁶⁷ These “collective rights” include the “rights of peoples” to existence and to unquestionable and inalienable right to self-determination [Art. 20 (1)]; freedom and liberation from colonial domination in accordance with international law [Art. 20 (2)]; support for liberation against foreign political, economic or cultural domination [Art. 20 (3)]; not to be deprived of the freedom to dispose of their wealth and natural resources in their own interest [Art. 21 (1)]; lawful recovery of its property and adequate compensation in the event of any unlawful deprivation or dispossession [Art. 21 (2)]; socio-economic and cultural development consistent with their identity and common heritage [Art. 22 (3)]; national and international peace and security, and friendship with other nations in consonance with the Charters of the UN and OAU [Art. 23 (1)]; a satisfactory environment [Art. 24]; duty to promote and ensure the respect and understanding of the rights and freedoms contained in the Charter through teaching, education and publication [Art. 25] and duty to guarantee the independence of the Courts and the establishment and improvement of appropriate national institutions to promote and protect the rights and freedoms guaranteed by the Charter [Art. 26].

¹⁶⁸ Article 28

¹⁶⁹ These obligations, per Article 29 includes to assist one’s nation and community with one’s physical and intellectual endowments, to protect and not to threaten national security, to defend the territorial integrity of the state, to create or provide employment and to pay one’s taxes.

¹⁷⁰ Article 27.

¹⁷¹ Phillip A., “The African Charter on Human and Peoples’ Rights- An Effective Weapon for Human Rights”, *4 Journal of Inter’l & Comp. Law*, 1992, at 226.

¹⁷² Yerima F. Timothy, “African Continental Human Rights Courts: Features and Comparative Critique with the European and Inter-American Courts of Human Rights” *Journal of Contemporary Legal Issues*, Vol. 1 No. 1, 2009, 20-34.

It was not until 1998 that the Assembly of Heads of States and Governments of the OAU adopted a Protocol¹⁷³ establishing the African Human Rights Court¹⁷⁴ to give judicial teeth to the rights contained in the African Charter and allied human rights instruments ratified by relevant Member States.¹⁷⁵

2.6.2.1 The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights was established under article 30 of the African Charter with its functions listed in article 45 of the Charter to include the promotion of human and peoples' rights, the protection of human and peoples' rights and the interpretation of the provisions of the African Charter.

The Commission also receives and examines reports from member states outlining what legislative or other steps have been taken or are being taken to meet the obligations of protecting and promoting human rights in their jurisdictions.¹⁷⁶ After considering these reports, the Commission may address general observations to the State concerned or transmit the general observations and the State party's report and comments to the Assembly of Heads of State and Government of the AU. The Commission may also receive and consider individual communications alleging violation by a State party of any of the rights guaranteed in the Charter.¹⁷⁷

Interestingly too, if a State party believes that another State party is in breach of its obligations under the Charter, that State party may draw the attention of the violating State Party to such breach, or bring the matter to the attention of the Commission directly. This is known as an inter-state communication of the African Commission on

¹⁷³ Article 66 of the African Charter authorizes the adoption of Protocols and Agreements as supplements pursuant to the Charter provisions.

¹⁷⁴ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Charter on Human and Peoples' Rights African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROJIII (entered into force on 25 January 2004).

¹⁷⁵ Article 3 (1) of the Protocol, *op.cit.*

¹⁷⁶ Article 62 of the African Charter.

¹⁷⁷ Article 55 *ibid*

Human and Peoples' Rights.¹⁷⁸ In any case, the Commission will investigate the complaint and issue a decision known as "recommendation".¹⁷⁹ This recommendation is however, non-compelling.

At least two eminent scholars posit that one of the major challenges facing the Commission is the "absence of effective follow-up mechanism to ensure implementation of its findings and recommendations."¹⁸⁰

Other lapses in the Commission, according to Udombana,¹⁸¹ include lack of effective individual access, lack of power to enforce or remedy breach of human rights, lack of independence and inadequate funding. These, *inter alia*, necessitated the need for an African Human Rights Court with full judicial powers.

2.6.2.2 The African Human Rights Court

The African Human Rights Court came into being on 9 June 1998 following the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Charter on Human and Peoples' Rights African Court on Human and Peoples' Rights¹⁸² and it entered into force on 25 January 2004.

The Court was established as a regional human rights court to enforce compliance with the Charter provisions or provide remedies to victims of human rights violations in Africa, a necessary role which the African Commission on Human and Peoples' Rights could not play under the African Charter system. The establishment of the African Human Rights Court placed the African regional mechanism at par with other regional

¹⁷⁸ See articles 47–49 and 52 *ibid*.

¹⁷⁹ Article 46 *ibid*

¹⁸⁰ Murray, R., & Long, D. (2015). *The Implementation of the Findings of the African Commission on Human and Peoples' Rights*: Cambridge University Press, p. vii.

¹⁸¹ Udombana N. J., *Human Rights and Contemporary issues in Africa* (Lagos: Malthouse Press Ltd., 2003) at 128-133; Obiora C. O., *The African Human Rights System- Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007) at 71-73.

¹⁸² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998: OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

mechanisms like the European and Inter-American Human Rights mechanisms which also have Human Rights Courts in addition to Human Rights Commissions as earlier stated in this chapter.

The main functions of the Court under article 3 (1) of the Protocol establishing it is to enforce compliance with the Charter provisions and provide remedies for victims of human rights violations in Africa.

The Court is composed of eleven judges with not more than one from each AU member state, and who must have verifiable experience on matters relating to human and peoples' rights in addition to practical judicial and academic competence.¹⁸³

The judges of the Court are elected by the AU Assembly to serve on a part-time basis¹⁸⁴ for a single six year renewable tenure,¹⁸⁵ due consideration being given to persons from major regions of Africa, major legal systems as well as adequate gender representation.¹⁸⁶ This "adequate gender representation" in the election of judges will certainly ensure that key issues bothering on the violation of women's rights in Africa are not relegated to the back bench. This also places the African Court ahead of its European and Inter-American Counterparts which have no provision for adequate or equitable gender representation in the appointment of judges.¹⁸⁷

Yerima¹⁸⁸ contends that the African Human Rights Court provides judicial guarantee for the protection of human rights in Africa and fills the gap in the African human rights system vis-à-vis the European and Inter-American systems.

¹⁸³ Article 11 of the African Human Rights Court Protocol.

¹⁸⁴ By Article 15 (4) *ibid*, other than the President of the Court, all other judges of the African Human Rights Courts are to serve and function part-time.

¹⁸⁵ Articles 11(1) and 15 (1) *ibid*.

¹⁸⁶ Articles 11 (2) and 14 (2) *ibid*.

¹⁸⁷ Yerima F. Timothy, "African Continental Human Rights Courts: Features and Comparative Critique with the European and Inter-American Courts of Human Rights", *op.cit* at 24.

¹⁸⁸ Yerima F. Timothy, *ibid* at 21-22.

The African Human Rights Court Protocol provides for the impartiality and independence of the judges by providing in Article 18 that office of a judge is incompatible with any activity that will compromise or interfere with his impartiality and independence. Also, a judge of the African Human Rights Courts cannot sit on a panel if the case to be heard is one in which his country of origin is a party.¹⁸⁹ Furthermore, by Article 19 (1), a judge of the Court cannot be removed or suspended from office without the unanimous agreement of the other judges confirming that the erring judge is no longer fit to perform the functions of a judge. This is to insulate the office of the judges from unnecessary political stampede of their home states in the event that refuses to compromise their positions when pressured to do so. But once a judge is so removed by the unanimous agreement of his brother judges, it shall be final unless the Assembly of Heads of State and Government reverse the decision in the following session.¹⁹⁰

The adjudicatory mechanism of the African Human Rights Court is liberalised and devoid of unnecessary procedural hiccups because the Protocol permits the Court to develop its own rules and procedure. This is to circumvent the delayed justice which may ensue from strict rules of procedure and unnecessary legal technicalities, including the requirement of exhaustion of local remedies which has been the bane of the African Human Rights Commission. For instance, in *Social and Economic Rights Action Centre (SERAC) & Anor v. Nigeria*¹⁹¹ where the issue of local remedies was waived because the Commission's earlier communication to Nigeria was roundly ignored by the country. This caused a delay whereby it took the Commission five years to take a decision on the matter.

¹⁸⁹ Article 22 of the African Human rights Protocol.

¹⁹⁰ Article 19 (2).

¹⁹¹ Communication No. 155/95

The Court may receive communications from the African Commission, Non-Governmental Organisations and individuals. Article 56 of the African Charter stipulates certain preconditions for the admissibility of Communication by the African Human Rights Court. These are:

1. It must bear the author's name even if he requests for anonymity. This will ensure that the Court process is not abused by mere busy-bodies.
2. It must be written in a clear and unambiguous language which does not insult or disparage the concerned State or its institutions or the AU.
3. The communication must be brought to the Court within reasonable time after all local remedies have been fully exhausted,¹⁹² a requirement which has been described as the most controversial of all.¹⁹³
4. It must be compatible with the African Charter or the Constitutive Act of the AU.
5. Must not be matters that have already been settled one way or the other.
6. May be sent directly if other remedies are taking unduly long time.

Access to the African Human Rights Court takes two form namely, Automatic access and Optional access. Under Article 5 (1) of the Human Rights Court Protocol, a State Party acquires automatic access to the Court once it ratifies the Protocol. On the other hand, under Article 5 (3) and 34 (6), the Optional Protocol involves the signing of a separate Declaration authorising the Court to receive communications from an individual and NGOs against a State Party.

For instance, in the case of *Femi Falana v. The African Union*,¹⁹⁴ the applicant, a Nigerian human rights lawyer approached the African Human Rights Court with an application against the African Union. In his Application he averred that the

¹⁹² See *SERAC v. Nigeria*, *supra*.

¹⁹³ Yerima, *op.cit* at 27.

¹⁹⁴ Application No. 001/2011 <http://www.africaunion.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf> (12/10/2013).

Government of Nigeria had not made a Special Declaration *vide* Article 34(6) of the Protocol so as to confer upon individuals the right of access to the African Human Rights Court. He further averred that the Nigerian government had ignored several of his attempts pressurising it to make the Special Declaration. He averred further that this refusal or failure to accept the competence of the Court in line with Article 34(6) of the Protocol has denied lawful access to Court.

The Court rejected his application by a 7-3 majority votes on the grounds *inter alia*, that the African Union is juristic person is neither a party/signatory to the African Charter nor the Protocol itself, and therefore cannot be subject to any obligation under any of them. Accordingly, the Court reiterated that the combined import of Article 5(3) and 34(6) of the Protocol, it lacked the jurisdiction to hear cases instituted by nationals of a country which has not complied with said Articles of the Protocol.

Bearing in mind that individuals and NGOs are the major players and the most likely petitioners against the respective States for human rights violations, this lack of direct individual access to the Court is an anti-climax and “a major embarrassing obstacle”¹⁹⁵ which “contradicts acceptable standards for human rights protection”¹⁹⁶ and therefore raises doubt on the sincerity and willingness of African States to submit to judicial scrutiny for human rights protection and violations.¹⁹⁷

The proceedings of the African Court including its judgements must also be conducted in public¹⁹⁸ and its judgement as handed down by the majority of the judges within ninety days of conclusion of hearing,¹⁹⁹ “shall be final and not subject to appeal.”²⁰⁰

¹⁹⁵ Mughwai A., “The African Court on Human and Peoples’ Rights: Prospects and Challenges”, available online at <http://www.cam.es/docs/fiheros/20081003000769pdf>. (Cited in Yerima, T. F. (2011). Comparative Evaluation of the Challenges of African Regional Human Rights Courts. *Journal of Politics and Law*, 4(2), p120.

¹⁹⁶ Olisa Agbakoba, “The Creation of the African Court of Justice and Human Rights”, available online at www.nbaprogrammes.org. (14/4/2015).

¹⁹⁷ Yerima, *op.cit* at 33.

¹⁹⁸ Article 10 (1) of the African Human Rights Court Protocol.

¹⁹⁹ The Protocol did not say the effect of non-compliance with this provision or the quality of a judgement handed down outside the prescribed time frame. This is indeed a *lacuna*. However, in the light of the domestication of the African Charter into local

Furthermore, parties may be represented by counsel of their choice, albeit legal aid may avail a party if it is in the interest of justice.²⁰¹ Article 10 (3) also guarantees unfettered assistance, facilities and protection of the African Human Rights Court to all persons, parties, witnesses or representatives appearing before it “in accordance with international law, necessary for discharging their functions, tasks and duties in relation to the Court.”

Under Article 27 (1) of the enabling protocol, the African Human Rights Court shall “order an appropriate measure to remedy the violation including the payment of fair compensation or reparation” if it is satisfied that a victim’s right under the African charter has been violated. The Court may also make necessary interim or provisional orders to maintain *status quo* if the case is one of “extreme gravity and urgency and pending, and when necessary to avoid irreparable harm to persons.”²⁰² This provision is indeed significant because it can help to protect human rights by mitigating the extent of violation or stalling further violation of rights pending the determination of the substantive communication by the Court.

The judgement of the Court shall bind member states and parties thereto and copies thereof are sent to the African Commission, the member States and the Assembly of Heads of State and Government through the Council of Ministers of the AU.²⁰³ Thereafter, the State Parties must comply with the obligation guaranteeing compliance with and execution of such judgement, and within the time which may be prescribed by the Court for its compliance/execution.

legislation in Nigeria, the relevant provisions of the 1999 Nigerian Constitution (that is, Section 294 (5)) as well as relevant decisions of Nigerian courts may be applied with respect to judgements delivered out of time, in which case, it shall not be set aside or voided unless there was a miscarriage of justice on the part of any of the complaining applicant. Under the said Section 294 (5) of the Nigerian Constitution: “The decision of a Court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provision of sub-section (1) of this Section (on the issue of 90 days) unless the Court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason therefore.”

²⁰⁰ Article 28 of the African Human Rights Court Protocol.

²⁰¹ Article 10 (2) of the African Human Rights Court Protocol. The Protocol did not however say who will bear the cost of providing the legal aid.

²⁰² Article 27 of the African Human rights court protocol.

²⁰³ Article 29 *ibid*.

It is also a *lacuna* that the African Human Rights Court will remain helpless if any of its decisions is ignored by the member State or party against whom it is directed because the Court lacks the machinery, organ or authority (such as an African Police) to ensure due and diligent execution of, or compliance with its judgements. This is without prejudice to the powers of the Court under Article 31 of the enabling Protocol to publish the list of State violators of its judgements and decisions in its annual report to the AU, thereby stigmatising, peer-reviewing,²⁰⁴ exposing and “shaming”²⁰⁵ the disobedient State in the comity of African nations.

So far, it is clear that inasmuch as the African Human Rights Court is considered a bold step in the judicial enforcement and protection of human rights in Africa, the part-time status of its judges, the apparent denial of direct access to NGOs and individuals among others, are sour thumbs for which Yerima has likened to “giving justice with the left hand and seizing it with the right hand.”²⁰⁶

2.6.2.3 Women Protocol to the African Charter

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa²⁰⁷ (“The African Women’s Protocol” or “The Maputo Protocol”) was adopted in 2000, as a women-specific mechanism ‘to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights.’ Apparently, the Maputo Protocol was necessitated by the lack of clear and specific provision for protection or implementation of women’s rights generally

²⁰⁴ Pityana N.B., “The African Court on Human and Peoples’ Rights in Municipal Law”, Seminar for Southern African States on Ratification of the Protocol to the African Charter on the Establishment of the African court on Human and Peoples’ rights, Gaborone, Botswana, 9-12 Dec. 2003, available online at <http://www.unisa.ac.39/contents/about/principle/does/municipallawdoc>. (cited in Yerima, *op.cit* at 32).

²⁰⁵ See Mutua A., “The African Human Rights Court: a Two Legged Stool?” 21 Human Rights Quarterly, 342 and 358.

²⁰⁶ Yerima, *op.cit* at 33.

²⁰⁷ Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, *entered into force* on Nov. 25, 2005. <https://www1.umn.edu/humanrts/africa/protocol-women2003.html>. (10/4/2015).

under the African Charter.²⁰⁸ This fact is evident from the Preamble to the Women's protocol which expresses concern that:

despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of State Parties and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.²⁰⁹

The African Women Protocol promotes the human rights of women in Africa by specifically prohibiting violence against women, including discrimination, sexual violence and harmful practices among others.²¹⁰

Article 1 of the African Women Protocol defines various terms used in the Protocol, four of which are very particular to this research namely,

1. "Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.²¹¹
2. "Harmful Practices" means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.²¹²
3. "Violence against women" means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and

²⁰⁸ F Viljoen "An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2009) 16 Washington & Lee Journal of Civil Rights & Social Justice 17.

²⁰⁹ See Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (20/10/2014).

²¹⁰ Article 1 defines discrimination against women, violence against women and harmful practices against women. Other specific rights contained therein include: elimination of discrimination against women (article 2); rights to life, integrity and security of person (article 4); obligation to eliminate harmful practices (article 5); special protection of women in armed conflicts (article 11); women's right to education and training (article 12); women's socio-economic and welfare rights (article 13); right to health and reproductive rights (article 14); right to food security (article 15); right to adequate housing (article 16); right to a healthy and safe environment (article 18); right to special care protection for elderly women (article 22); the provision of special care and protection for women with disabilities (article 23); provision of special care and protection for women in distress (article 24).

²¹¹ Article 1 (f) of the African Women Protocol.

²¹² Article 1 (g) *ibid*.

economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.²¹³

4. “Women” mean persons of female gender, including girls.²¹⁴

The definition of “women” to include girls suffices that the entirety of this research on the right of dignity of women invariably covers the right to dignity of the girl-child too. It further suffices the protections offered to women against all forms of violence and harmful practices as well as discrimination under the African Women Protocol apply equally to the girl-child.

Its Article 3 specifically provides for the right to dignity of women in elaborate terms thus:

1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights;
2. Every woman shall have the right to respect as a person and to the free development of her personality;
3. States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women;
4. States Parties shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

The Women Protocol is particularly significant because it also widows-sensitive. Its Article 20 enjoins State Parties to “take appropriate legal measures to ensure that

²¹³ Article 1 (j) *ibid.*

²¹⁴ Article 1 (k) *ibid.* It will be seen in the future if, and to what extent, this definition will cover transgender people.

widows enjoy all human rights” by ensuring that widows are not subjected to inhuman, humiliating or degrading treatment, and shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children. Similarly, a widow shall have the right to remarry, and in that event, to marry the person of her choice.²¹⁵

Under Article 21 of the Women Protocol, a widow shall have the right to inherit an equitable share in her late husband’s as well as the right to continue to reside in the matrimonial home. Even if she remarries, she can still retain the house if it belongs to her by purchase or inheritance.²¹⁶ Under the Protocol, women shall also have same right as men to inherit the estate of their parents equitably.²¹⁷

Suffice to say that the Women Protocol makes sufficient provisions for the protection of African women’s rights generally. Interestingly, Article 31 provides that in member states where existing national, regional, continental or international instruments and treaties offer wider and better protections for women’s rights, the Women Protocol shall be waived in preference to those other instruments.

Both Nigeria and South Africa have signed, ratified and deposited the Maputo Protocol.²¹⁸ But albeit the protocol is obviously women-centric (addressing feminine issues like domestic violence, polygamy, female genital mutilation, women’s equality, reproductive rights and maternal healthcare), Viljoen²¹⁹ expressed fear that the protocol may be bedevilled by common impediments to the implementation of the parent Charter because, for instance, from its adoption in 2003 up to 2009, no single inter-state or individual communications alleging any violation of the Protocol was received by the

²¹⁵ Article 20 (a)-(c).

²¹⁶ Article 21 (1)

²¹⁷ Article 21 (2)

²¹⁸ Nigeria signed the Protocol on 16/12/2003, ratified it on 16/12/2004 and deposited it on 18/2/2005. South Africa signed it on 16/3/2004, ratified it on 17/12/2004 and deposited it on 14/1/2005. Source: African Commission on Human and Peoples’ Rights <http://www.achpr.org/instruments/women-protocol/ratification/> (20/10/2014).

²¹⁹ F Viljoen “An introduction to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.” (2009) *op.cit.* 38-40.

Commission or the African Human Rights Court,²²⁰ and this does not of course suggest any lack of abuse nor does it guarantee the promotion and protection of women's rights or the dignity of women in Africa within the period.

2.6.2.4 The African Charter on the Rights and Welfare of the Child

Another African instrument which invariably seeks to protect and promote the right to dignity of women, in this case, the girl-child is the African Charter on the Rights and Welfare of the Child, adopted under the auspices of the then OAU (now African Union, AU). It makes various provisions for various rights and protections for African Children and lists legislative and other specific measures which States parties of the AU (in this case, Nigeria and South Africa) must take to implement the Charter provisions for the right and welfare of African children (in this case, the girl-child). Additionally, the Charter protects other rights which may directly or indirectly impact on a girl-child's enjoyment of the right to dignity, safety, health and welfare. These include non-discrimination²²¹; welfare of handicapped children²²²; protection against child labour²²³; protection against torture, inhuman or degrading treatment and child abuse (article 16); family protection²²⁴; protection against harmful traditional rites and socio-cultural practices;²²⁵ safety and protection of refugee children²²⁶; protection against sexual exploitation²²⁷; and against the use and abuse of illicit drugs.²²⁸

South Africa signed the Charter on 10 October 1997 and ratified it on 7 January 2000 while Nigeria signed it on 13 July 1999 and ratified it on 23 July 2001.²²⁹

²²⁰ *Ibid.*

²²¹ Article 3.

²²² Article 13.

²²³ Article 15.

²²⁴ Article 18.

²²⁵ Article 21.

²²⁶ Article 23.

²²⁷ Article 27.

²²⁸ Article 28.

²²⁹ <http://www.achpr.org/instruments/child/ratification/>. (10/4/2015). Nigeria has domesticated this charter into the Child Rights Act but this researcher fear that the constitutional and judicial threats regarding the enforcement and status of African Charter, even after its domestication may also affect the Child Rights Act.

2.6.2.5 Commitment of States to the African Regional Framework

Here, the researcher precisely examines the level of commitment which Nigeria and South Africa have respectively made to the African Charter and how this have impacted on the protection of women's right to dignity in Africa.

Generally, Nigeria's commitment to the African Charter is weak even though the Charter has been domesticated as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10, Laws of the Federation of Nigeria, 1990²³⁰ in accordance with the provision of Section 12 of the 1999 Nigerian Constitution. Ordinarily, the fact of domestication should have enabled automatic application of the Charter but it does not. This is owing to the fact that Nigerian Courts still hold Cap 10 as part of Nigeria's municipal law which makes it naturally inferior to the 1999 Nigerian Constitution, including Section 6 (6) (c) which declare certain class of rights guaranteed under the Charter as non-justiciable. This presupposes that Nigeria consider the Charter as part of international law and therefore non-compelling.

In *Chief Gani Fawehinmi v. Gen. Sani Abacha*,²³¹ the Supreme Court considered the status of Cap 10, Laws of the Federation of Nigeria, 1990 and held *inter alia*, that although the legislation is one with international appeal, in the event of any conflict its provisions can only prevail over other domestic legislation but certainly not over the Nigerian Constitution.

The fact that Nigerian courts are not obliged to follow and apply international law in the interpretation of fundamental rights remain a threat to the enjoyment of human rights in Nigeria, coupled with the fact that Nigerian Courts still consider human rights (applicable in international law) as merely persuasive while only the fundamental rights guaranteed in Chapter 4 of the 1999 Constitution remains justiciable as positive rights.

²³⁰ Or, Cap A9, Laws of the Federation of Nigeria, 2004.

²³¹ (2000) 4 SC (part II) 1.

Consequent upon the distinction between “human rights” and “fundamental rights” in Nigeria, most of the second generation of rights (socio-economic rights) guaranteed under the African Charter and international law as positive rights are described as “fundamental objectives and directive principles of state policy” (that is negative rights) in Chapter 2 of the Nigerian Constitution, and made non-justiciable by Section 6 (6) (c) thereof. This is not so in South Africa. Also there is no formal or constitutional role for NGOs and allied organisations for the monitoring of violations and human rights implementation in Nigeria. The National Human Rights Commission of Nigeria should be empowered to play the same constitutional role as the South African Human Rights Commission (SAHRC).²³²

Section 39 (1) (b) of the South African Constitution makes it mandatory for the Courts to apply international law when interpreting the Bill of Rights in the Constitution. This Bill of Rights is also all-encompassing because it contains both the civil and political rights (guaranteed and justiciable fundamental rights in Nigeria) and the second generation of rights (the non-justiciable rights in Nigeria) as well as environmental rights and make all justiciable and enforceable.²³³

Furthermore, the South African Constitution Section 233 provides that when interpreting legislation, the Court must prefer an interpretation which conforms to international law to an interpretation which does not. Accordingly, the Courts in South Africa have continued to uphold to this tenet. Thus in the celebrated right to housing case of *Grootboom v. Oostenberg Municipality & Ors*²³⁴ and *Ex parte Chairperson of the Constitutional Assembly: Re Certification of the Constitution of the Republic of South Africa*,²³⁵ the South African Constitutional Court held *inter alia* that the issue as

²³² Ogunniran, I. (2010). Enforceability of Socio-Economic Rights: Seeing Nigeria through the Eyes of Other Jurisdictions. *Unizik Journal of International Law and Jurisprudence*, 1(September 2010), 73-87 at 87.

²³³ See The Bill of Rights in Chapter 2 of the Constitution of South Africa, 1996.

²³⁴ 2000 (3) BCLR 277 (c); *South Africa v Grootboom*, 2001 (1) SA 46 (CC).

²³⁵ 1996 (4) S.A. 46 (CC).

to whether socio-economic rights are justiciable at all in South Africa was put beyond doubt by the text of the Constitution itself.

Section 184 (3) of the Constitution of South Africa obligates the South African Human Rights Commission to ensure that relevant organs of state furnishes it with information on steps being taken by them towards realizing the second generation of rights in the Bill of Rights. It is therefore without doubt, that South Africa has a strong commitment to the regional framework for the protection of human rights including the right to dignity of women in Africa, unlike Nigeria.²³⁶ Any reference to Nigeria as a leader in the justiciability of socio-economic rights is questionable.²³⁷

2.6.2.6 Critique of the African Regional Framework and the Way Forward

Although Murray²³⁸ calls the African Charter a timely and ambitious regional instrument, however, its Afrocentric emphasis²³⁹ on such communal imperative as anti-colonialism, people's rights, morality, imposition of duties on individuals and states and the attitude to derogations on justiciability of economic, social and cultural rights, have been considered as weak points of the Charter.²⁴⁰ Ouguergouz described the rights provision of the Charter as "imprecise" because "the pertinent clauses of the African Charter offer only weak legal protection to the individual."²⁴¹ Sindjoun considers the

²³⁶ Even though India is not bound by any regional human rights instrument, the creativity and activism its Supreme Court has ensured justiciability and a classical commitment to the enforcement of both first and second generation of human rights both under the Indian Constitution and under core international human rights law. This is without prejudice to the fact that the fundamental objectives and directive principles contained in Chapter 2 of the Nigerian Constitution were cloned from the Indian Constitution (See Ogunniran, I (2010) *op. cit.* at 79).

²³⁷ Ogunniran, I (2010) *op. cit.* at 79.

²³⁸ R Murray "The African charter on human and peoples' rights 1987-2000: An overview of its prospects and problems." (2001) 1 *African Human Rights Law Journal* 1.

²³⁹ F Viljoen "Africa's contributions to the development of international human rights and humanitarian law." (2001) *African Human Rights Law Journal* 20. See also the Thesis of Oluwasina, A. V. (2011). Domestic Impact of The African Charter on Human And Peoples' Rights and The Protocol on the Rights of Women in Africa: A Case Study of Nigeria, University of Pretoria.

²⁴⁰ Dada, J. A. (2012). Impediments to Human Rights Protection in Nigeria. *Ann. Surv. Int'l & Comp. L.*, 18, 67-92, at 75.

²⁴¹ "Un nouvel ordre humanitaire régional en Afrique", F Ouguergouz La Charte africaine des droits de l'homme et des peuples. Une approche juridique des droits de l'homme entre tradition et modernité' (1993) 389 (The English translation is "The African Charter on Human and Peoples' Rights: A legal approach to human rights between tradition and modernity") quoted in Oluwasina, A. V. (2011), *op.cit.* Chapter 1, page 1; citing JD Boukongou "The appeal of the African system for protecting human rights" (2006) 6 *African Human Rights Law Journal* 271at 285.

Charter as unrealistic and a mere “window-dressing for the purpose of acceding to international civilization.”²⁴²

The research, therefore, found that the penal authority of the African Commission on Human and Peoples’ Rights, which is responsible for implementing the African Charter, is simply “recommendatory” and non-compelling, and consequently, most states including Nigeria²⁴³ have, at one time or the other, simply ignored the Commission’s recommendations.²⁴⁴

It is therefore strongly recommended without prejudice to the African Human Rights Court, that the Commission be empowered to hand down enforceable punitive Orders against erring member states and individuals rather than exercising mere “recommendatory” and non-compelling authority. There is also need to rethink on the derogation clauses in the African charter as well as the part-time status of the judges of the African Human Rights Court and the lack of direct individual access to the Commission and the Court.

The long period of time between the adoption and entry into force of relevant Optional protocols to the African Charter is a minus to sustainable protection of human rights in Africa including the right to dignity of women. For instance, the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Charter on Human and Peoples’ Rights African Court on Human and Peoples’ Rights was adopted in 1998 and entered into force in 2004, and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the African Women

²⁴² L Sindjoun “La civilisation internationale des murs: éléments pour une sociologie de l’idéologie structurel dans les relations internationales” (1996) 27 *Etudes internationales* 848 quoted in JD Boukongou “The appeal of the African system for protecting human rights” (2006) 6 *African Human Rights Law Journal* 271, cited in Oluwasina, A. V. (2011), *op.cit.*

²⁴³ In the communication of the celebrated “Ken Saro-Wiwa and the Ogoni Nine” (*International Pen & Others (on behalf of Ken Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 8, the Nigerian government carried out the execution of the “Ogoni Nine” in violation of the recommendation of the African commission that the execution be suspended pending the final determination of their representative communication.

²⁴⁴ For instance, a 2003 Research carried out by Lirette Louw in South Africa showed that it was only in six cases out of 44 communications in which the African Commission found violation of the Charter did the concerned member states comply fully with its recommendations (See L Louw “An analysis of state compliance with the recommendations of the African Commission on Human and Peoples’ Rights” unpublished LLD thesis, University of Pretoria, 2005) 61.

Protocol) was adopted in 2000 and entered into force in 2005. It is also regrettable, that the Commission even has no way of monitoring or determining whether an indicted member state has complied with or is taking steps to comply with any of its recommendations.²⁴⁵

2.7 Conclusion

The African Charter of Human and People's Rights embodies the regional framework for the protection of human rights in Africa including women's right to dignity. It is also without doubt that the African Charter guarantees without qualification, the rights to equality before the law and to human dignity and inviolability.²⁴⁶ The Women Protocol to the African Charter also contains specific provisions for the guarantee of many facets of women's rights including the right to dignity of women in Africa including Nigeria and South Africa.

In all, it can be safely conceded that the rights of women, particularly the right to dignity of women, which African Union member states, particularly Nigeria and South Africa, have subscribed to under other international human rights instruments,²⁴⁷ are consistent with the provisions of the African Charter.²⁴⁸ However, the difference lies in the fact that while South Africa has shown unalloyed domestic respect and obligation to the regional framework, the same cannot be said of Nigeria.

In conclusion, this researcher most humbly considers it illuminating to reproduce *in extenso*, the observations of E. Steinerte and R.M.M. Wallace that:

²⁴⁵ JD Boukongou "The appeal of the African system for protecting human rights" (2006) 6 *African Human Rights Law Journal* 271 at 288.

²⁴⁶ Okpalaobi, B. (2014). "An Evaluation of the Relevance and Enforceability of African Charter on Human and Peoples Rights in Nigeria." *AFRREV IJAH: An International Journal of Arts and Humanities* 1(1): 304-317, at 306.

²⁴⁷ The relevant international human rights instruments have earlier been examined above.

²⁴⁸ Achenyo, A. L. (2009). Harmonizing the Status of women and Human Rights. *Journal of Contemporary Legal Issues*, 1(1), 189-201 at 199.

Although the benefit of international human rights instruments should accrue to the individual, such instruments are addressed to states. Primary responsibility for giving effect to the international human rights standards flowing from them therefore clearly rests with the national authorities of each contracting state.

How the provisions of international treaties become part of a state's municipal law is a matter of domestic law: Some states are dualist in their approach to international law, meaning that treaties must be transformed into domestic legislation (e.g. by way of an act of the domestic legislature) before their provisions will be considered part of the domestic legal system. The approach of other states is monistic: international treaties automatically become part of domestic law at the time a state accedes or ratifies the instrument.

These processes may allow an individual to claim the rights that the particular international human rights treaty protects. Such is the primary *raison d'être* of each international human rights treaty, as clearly any treaty is only as good as its implementation and enforcement. So it is not surprising that the international community has created ways of ensuring the effective implementation of international human rights treaties.'

CHAPTER 3

CONSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF THE RIGHT TO DIGNITY OF WOMEN IN NIGERIA, INDIA AND SOUTH AFRICA: A COMPARATIVE CRITIQUE

3.1 Introduction

The constitutional framework for protecting the right to dignity of women in Nigeria, India and South Africa lie in the basic provisions and guarantees of the right to human dignity in their national constitutions. However, the actual guarantee of this right is to be located not just in the *positive* or *justiciable* fundamental rights alone but also in the interpretation and justiciability of the Economic, Social and Cultural Rights (described as “Fundamental Objectives and Directive Principles of State Policy in Chapter II of the 1999 Nigerian Constitution, and Directive Principles of State Policy in Part IV, Articles 36-51 of the Constitution of India, 1950) which make life worth living *with dignity*. It also includes the latitude of the right to equality, access to justice and the procedure for enforcement of fundamental rights in respect of Nigeria, India and South Africa. The chapter also highlight the gaps in the Constitutional framework of the three jurisdictions under review and will conclude *inter alia*, that the ESC Rights are negative rights in Nigeria, implied rights in India, and positive rights in the South African Bill of Rights. It will further conclude that the South African constitutional model is classical while the Indian model is standardized by the judicial activism of its courts, and the Nigerian model is begging for immediate reform.

3.2 Constitutional Framework: NIGERIA

The 1999 Nigerian Constitution literally contains a guarantee for the right to human dignity. This obviously includes the right to dignity of women, albeit the non-justiciability of the second and third generation of rights [Economic, Social, Cultural

and environmental rights] which are necessary international indices for proper enjoyment of human rights (and listed in Chapter II of the Constitution as Fundamental Objectives and Directive Principles of State Policy) remain an inherent impediment.

3.2.1 The Right to Dignity of Women *Vis-a-vis* the Fundamental Objectives and Directive Principles of State Policy in the Constitution of Nigeria, 1999

The right to dignity of women in Nigeria is protected by the “Right to human dignity” in Section 34 of the 1999 Constitution which provides that: “Every person is entitled to the dignity of his/her person and no one shall be subjected to torture, inhuman or degrading treatment.” Article 4 of the African Charter on Human and Peoples’ Rights, 1981¹ also provides that “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

However, in Nigeria, apart from the first generation civil and political rights, the second generation of rights (comprising the Economic, Social and Cultural rights) which are necessary indices to guarantee protection of women’s dignity (as in the South African Constitution) are tagged *Fundamental Objectives and Directive Principles of State Policy* and are non-obligatory and non-justiciable by Section 6(6) (c) of the Constitution. Nigerian courts do not even imply them as enforceable rights like in India, even though they contain bundle of rights which would make human life and dignity more meaningful. In the case of *Attorney General (Ondo State) v Attorney General (Federation)*² the Nigerian Supreme Court emphasised that the fundamental objectives and directive principles of state policy are *mere declarations which cannot be enforced by legal process* unless the National Assembly enacts specific legislation for their enforcement.

¹ Cap 10, Laws of the Federation of Nigeria, 1990.

² (2002) 9 NWLR (Pt 772), 222.

The unreasonableness of the non-justiciability provision was decried by Akinola Aguda, JSC (rtd.) when he said:

I feel much concerned to think that the directive principles are to be regarded as a mere ideal, a utopia, the arrival of which the citizen can only pray and hope for, but in respect of which he can hope for no assistance whatsoever from the courts. If this were so then wherein lies the expectations and the hopes of a bright future for the teeming millions of our people..?³

It has also been considered a fallacious irony that the Constitution which is the supposed fundamental law of the land, that is, the *grundnorm* upon which other laws derive validity, would itself declare some of its own provisions unenforceable until it obtains a “green light” from the National Assembly or other legislation outside of itself.⁴

Even an important women-specific international human rights treaty like the CEDAW does not have legal force in Nigeria due to the perceived implication of the non-domestication provision under Section 12(1) of the 1999 Nigerian Constitution.

The said Section 12 (1) provides that:

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

This thesis humbly contends that an international human rights instrument like the CEDAW which is subscribed to by Nigeria does not fall within the contemplation of a *treaty between the Federation and any other country* in Section 12(1) because the

³ See Jemibewon, D. M., *The Military, Law and Society: Reflections of a General* (Ibadan: Spectrum Books Ltd. 1998) at 109. Quoted in Anthony O. Nwafor (2009) *Enforcing Fundamental Rights in Nigerian Courts – Processes and Challenges* (4 *Afr. J. Leg. Stud.* (2009) 1-11), p.5.

⁴ See G.N. Okeke and C. Okeke, “*The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria*” *IOSR Journal Of Humanities And Social Science (IOSR-JHSS)* Volume 7, Issue 6 (Jan. -Feb. 2013), PP 09-14 at 11. www.Iosrjournals.Org (7/6/2014).

United Nations is not a “country” by any stroke of interpretation. The researcher therefore recommends that the Nigerian courts should endeavour to resolve this constitutional aberration, by applying the kind of interpretational creativity and activism common in India.

Similarly, in Nigeria, there is no national law dealing with the rights of women or inherent societal inequalities against women.⁵ An attempt to domesticate the CEDAW by the promulgation of the ‘Abolition of all Forms of Discrimination Against Women in Nigeria and other Related Matters Bill, 2006’ (CEDAW Bill) was frustrated by the National Assembly⁶ due to lack of legislative seriousness and the fact that women rights issues are considered as being more domestic than national. Even the Nigeria National Gender Policy of 2000 (adopted in 2006) which is fashioned along the lines of CEDAW cannot be implemented due to inherent socio-political factors⁷ including lack of executive political will, men-dominated National Assembly, corruption and general insensitivity to the most pressing problems of women and girls. All these and more constitute “the Nigerian factor”.⁸

Nearly ten years after The Protocol of African Charter on Human and People’s Rights on the Rights of Women in Africa (Women’s Protocol),⁹ not a single individual or inter-state communication on violation of women’s right has been received by the Commission. At least one writer has, however, expressed hoped that the common socio-

⁵ Durojaye, E., Okeke, B., & Adebajo, A. (2014). “Harmful cultural practices and gender equality in Nigeria.” *Gender and Behaviour*, 12(1), 6169-6181.

⁶ Ebenezer Durojaye, *Woman, but not Human: Widowhood Practices and Human Rights Violations in Nigeria* *Int J Law Policy Family* (2013) 27 (2): 176-196. doi: 10.1093/lawfam/ebt001 First published online: May 6, 2013 (Viewed 11/7/2014).

⁷ Sani Mustapha Kura, (2013) “An analysis of Gender inequality and National Gender Policy in Nigeria” *op.cit* at 8.

⁸ This is a common derogatory phrase used in Nigeria to explain away the ills of government and corrupt public officials. It is a ready ‘excuse’ for every conceivably ineptitude on the part of government or society generally.

⁹ Adopted by the 2nd Ordinary Session of the African Union General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003) entered into force 25 November 2005.

political and cultural apathy which threaten the implementation of the parent document does not catch up with its protocol.¹⁰

More so, there is no compulsion on the Nigerian courts to apply international human rights law either arising from constitutional provisions or judicial activism as are common in India and South Africa. It is without doubt that the constitutional provisions for the sustainable guarantee of women's right to dignity in Nigeria are weak and inadequate.

3.2.2 The Supreme Court of Nigeria, *Locus Standi*, and Access to Justice for the Enforcement of Fundamental Rights

The notion of "access to justice" refers to the *ease of process* by which an aggrieved person may *institute action* for the enforcement of his fundamental right in a competent court. In Nigeria, this *ease* is lacking *inter alia*, because there is no right of access to the Supreme Court for the enforcement of fundamental rights at first instance, unlike in India and South Africa where, in addition to the High Court, this right of access also exists at first instance to the Supreme Court and the Constitutional Court respectively.¹¹

3.2.2.1 *Locus Standi*

Section 46(1) of the Nigerian Constitution provides thus:

Any person who alleges that any of the provisions of this Chapter¹² has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

¹⁰ D.M. Chirwa (2006) "Reclaiming Wo(manity): The merits and demerits of the African Protocol on Women's Rights" 56 *Netherlands international Law Review* 63-96.

¹¹ In India, a petitioner may present his *Writ* petition for the enforcement of fundamental rights before the Supreme Court at first instance under Article 32 or the state High Courts under Article 226. Thus, in *S.P. Gupta v. Union of India* [AIR 1982 SC 149], Justice Bhagwati stated that "*any member of the public or social action group acting bona fide* can invoke the *Writ* Jurisdiction of the High Courts or the Supreme Court seeking remedy against violation of the legal or constitutional rights of persons who for whatever reason or disability cannot approach the Court by themselves." And in South Africa, Section 167 of the Constitution permits a person to bring an action directly to the Constitutional Court or to appeal directly to the court, in exceptional cases, when it is in the public interest and with leave of the Constitutional Court.

¹² That is Chapter IV of the 1999 Nigerian Constitution which contains the Fundamental Rights provisions.

This common law doctrine of *locus standi* is therefore premised upon the assumption that “no court is obliged to provide a remedy for a claim in which the applicant has a remote, hypothetical or no interest.”¹³ Thus, where a plaintiff fails to disclose his legal basis, right or authority to demand for the reliefs he seeks or what injury he has suffered, is suffering or will suffer, he lacks *locus standi* to institute such a suit or be heard. This is the basic and archaic nature of *locus standi* which focuses on “the party” seeking to obtain relief from court rather than on “the issue” for which he seeks adjudication.¹⁴

It suffices that, even where the violation of fundamental right arises from a public injury or wrong which affects a number of people, the plaintiff can only be competent to sue if he shows that he has suffered more, or is likely to suffer more, than all the persons who have suffered the violation. This narrow or restrictive application of *locus standi* was applied by the Nigerian Supreme Court in two prominent cases: *Adesanya v. The President of the Federal Republic of Nigeria*¹⁵ and *Olawoyin v. Attorney-General of Northern Nigeria*.¹⁶

It needs to be mentioned that in the celebrated case of *Fawehinmi v. Akilu & Anor*,¹⁷ the Supreme Court interpreted and applied *locus standi* in a liberal or expansive manner when it held in favour of the applicant’s application for mandamus that, with respect to criminal law, by Section 342 and 343 of the Criminal Procedure Law, “every Nigerian is his brother’s keeper and that any person including a legal practitioner can bring an application for mandamus to compel the Director of Public Prosecutions to exercise his

¹³ Per Oputa J.S.C. in *Attorney General of Kaduna State v. Hassan*, 2 NWLR (Pt 8) 483 at 524-525.

¹⁴ Malemi, E. (2012). *The Nigerian Constitutional Law (With Fundamental Rights Enforcement Procedure Rules, 2009)*. Lagos: Princeton Publishing Company, pp. 501-502.

¹⁵ (1981) All NLR 1 SC.

¹⁶ (1961) 2 SCNLR 5. This restrictive application of *locus standi* has been followed in several other cases including *Thomas v. Olufosoye* (1986) 1 NWLR Part 18, p.669 SC; *Chuba Egolum v. Olusegun Obasanjo* (1999) 7 NWLR Part 611, p. 355; *Keyamo v. Lagos State House of Assembly* (2000) 12 NWLR Part 680, p.196 CA; *Fawehinmi v. Inspector General of Police* (2002) 7 NWLR Part 767, p.606 SC. But this is not so with the application of Public Interest Litigation/Class Action Litigations in South Africa and India as well as the doctrine of epistolary jurisdiction of courts in India.

¹⁷ (1987) 1 NWLR Part 67, p.797 SC. In that case, the applicant, a legal practitioner and friend to Mr. Dele Giwa, former Editor of *Newswatch* Magazine who was murdered by parcel bomb. The court was to decide whether the applicant as a friend of the deceased and attorney to his media outfit had legal competence to sue for the brutal murder of his friend. The court held that he had and that every Nigerian had a duty to one another as “his brother’s keeper.” However, the military government of Nigeria at the time circumvented that decision with an Edict restricting *locus standi* to criminal cases only. This narrow application of *locus standi* remains part of the Nigerian law till date.

discretion to prosecute an alleged crime or in default permit a private prosecution of it.”¹⁸

This decision is the *locus classicus* on the liberal approach to *locus standi* in Nigeria.¹⁹ But unfortunately, the Supreme Court in *Fawehinmi v Akilu* did not overrule its earlier decision on the narrow approach to *locus standi* in *Adesanya v. The President of the Federal Republic of Nigeria*. Consequently, both cases represent the legal precedents on the subject in Nigeria and leave it to a judge’s discretion on which approach to adopt in given cases. And according to Ese Malemi,²⁰ “over the years, however, the courts have tended more to apply the decision in *Adesanya’s* case” in spite of the fact that “on the whole a narrow or restrictive application of *locus standi* usually and generally frustrates public interest litigation, the monitoring and enforcement of human rights and access to justice and remedy, among others.”²¹

Taiwo Adewale²² laments that it is regrettable that Nigerian Courts still remain largely conservative with regards to *locus standi* at a time when other common law countries are adopting the liberal, sustainable and globalized approach to the subject in the enforcement and protection of human rights.

Dada has expressed the view that though the doctrine is being gradually relaxed, it remains a ‘formidable albatross’ in human rights litigation in Nigeria.²³

¹⁸ *Ibid* at 874.

¹⁹ The High Courts also applied the liberal approach to *locus standi* in these cases: Mike Ozehome & Ors v. President of the Federal Republic of Nigeria & Anor (1990) 2 WBRN 58; Beko Ransome Kuti & Ors v. Attorney-General of the Federation (Unreported) Suit No. M/287/92; Adefalu & Ors v. Governor of Kwara State & Ors (1984) 5 NCLR 766.

²⁰ *Op. cit* at 511.

²¹ *ibid* at 507.

²² Taiwo, E. A. (2009). Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision. *African Human Rights Law Journal*, 9(2), 546-575.

²³ Dada, J. A. (2012). Impediments to Human Rights Protection in Nigeria. *Ann. Surv. Int’l & Comp. L.*, 18, 67-92 at 87.

According to Hon. Justice Philip Nnaemeka-Agu, JSC,

We look forward to a time when Nigeria will advance to the position of Canada where every citizen has not only the right to be heard, but has also the *locus standi* to challenge such breaches of the provisions of the Constitution.²⁴

3.2.2.2 Enforcement of Fundamental Rights

Generally, in Nigeria, the frustration apparent in the enforcement of fundamental rights begins from the point of determining his legal standing, that is *locus standi*, and up till choosing which particular court has competence to hear the petition up till the process and rules of procedure for the enforcement of these fundamental rights.

Where the applicant has good standing in law and but the violator of the fundamental right is the government or its agent, the application shall, by Section 251 of the Nigerian Constitution, be initiated at a Federal High Court, even though most states in Nigeria do not have Federal High Courts and most of the 774 local governments do not even have High Courts. Added to an ordinarily frustrating and clumsy enforcement procedure inherent in the Fundamental Rights (Enforcement Procedure) Rules, 2009,²⁵ this is a limiting or inhibiting factor to access jurisprudence for fundamental rights enforcement process in Nigeria.²⁶ Similarly, where a statute makes it a condition precedent to serve a pre-action notice on a defendant, the failure to comply therewith would also deny a party of *locus standi* irrespective of “the issue” at stake.²⁷

The general frustration in the access to justice in Nigeria was once described thus:

The procedure for the enforcement of fundamental rights in the High Courts requires the obtaining of leave of court by filing a motion *ex parte* supported

²⁴ “Human Rights Proceedings: Domestic Provisions and Experience of Nigeria” p.7, Presented at the Judicial Colloquium on the Democratic Application of International Human Rights Norms held in Abuja, Nigeria on 9-13 December, 1991.

²⁵ Broad and specific inherent hiccups in the Rules are discussed below in this section as well as in Chapter 5 of this thesis.

²⁶ Anthony O. Nwafor, “Enforcing Fundamental Rights in Nigerian Courts-Processes and Challenges,” 4 *Afr. J of Leg. Stud.* (2009)1-11, p.8

²⁷ Malemi, E., (2012) op. cit at 502.

by an affidavit, the statement of material facts and verifying affidavit within twelve months of the occurrence of the event complained against. When leave is granted, a motion on notice is filed in the same manner as the motion *ex parte* and served on the party complained against (respondent). The party served must have at least eight days to respond, before the hearing, which must be within fourteen days of the granting of leave.²⁸

In the Nigerian case of *Oguebe v Inspector-General of Police*,²⁹ the court refused an application for leave to enforce the fundamental right to personal liberty, on the ground that the application for leave was sought 30 months after the alleged breach. A similar decision was held in another case, *Fred Egbe v. Honourable Justice Adefarasin*.³⁰ This is most contradictory of the Statute of Limitation which sets six years as the time within which such civil breaches must be redressed or be statute-barred. Interestingly, under Order III Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules, 2009 (which replaces the previous Rules of 1979), this limitation of time no longer exist in Nigeria's fundamental rights jurisprudence.

The 2009 Rules also seemed to have widened the scope of *locus standi* beyond the precise provision of Section 46 (1) of the 1999 Nigerian Constitution, because while the Constitution empowers 'a High Court in that State' to hear applications for breach of fundamental rights, the 2009 Rules empowers 'the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory, Abuja' to do same under Order 1 Rule 2.

It also gives impetus to the African Charter by providing that an action for breach of fundamental rights may lie in the event of a breach, likelihood of a breach of any of the fundamental rights guarantees in the 1999 Constitution or the African Charter on

²⁸ Anthony O. Nwafor, *ibid*, while analysing the Fundamental Rights (Enforcement Procedure) Rules, 1979. But the current Fundamental Rights (Enforcement Procedure) Rules, 2009 has eliminated the requirement of leave and by its Order II Rule I, the applicant may choose to commence the action by a motion on notice or any other originating process acceptable to the court. The application shall be accompanied by a statement, affidavit in support, with or without exhibits and a written address. The requirement of filing of a verifying affidavit is also eliminated and the cost of filing reduced substantially.

²⁹ (1999) 1 FHCLR 59.

³⁰ (2003) 14 WRN 57.

Human and People's Rights (Ratification and Enforcement) Act 2004.³¹ But regrettably, other laudable provisions of the 2009 Rules are contained in its "Preamble" rather than as specific *Order(s)* or *Rules(s)* as is conventional with such Rules. Even an important issue like "Public Interest Litigations" is placed in the preamble only.³² Accordingly, fear has also been expressed that "the nature of a preamble does not give assurance that the contents have much legal weight."³³ This fear is reasonable, considering the decision in the American case of *Jacobson v Massachusetts*³⁴ which emphasised that the Preamble does not have any legal force, even in the Constitution because it merely introduces the document as a whole and does not, in and of itself, permit the exercise of any legal power whatsoever, and that any power exercisable under the Constitution must emanate from another part of the Constitution but definitely not the preamble.³⁵

Worse still, the 2009 Rules have failed to eliminate the threat of complexity in the commencement of an action that was the bane of the 1979 Rules. By Order 9(1), the failure to comply with the provision as to place, time, form or manner in an application for the enforcement of fundamental rights shall be considered a mere "irregularity" which may not nullify the proceedings unless "it relates to the mode of commencement" of the application. Suffice to say, nonetheless, that the usual rigours of commencement of action must certainly be complied with. This offers another reason for the view that

³¹ See Aligba, A. (2011). Fundamental Rights (Enforcement Procedure) Rules 2009: An Appraisal. *Benue State University Journal of Private and Public Law, BSUJPL*, 1(1), 61-70., especially pp. 67-68.

³² Preamble 1 (e) reads: "The Court shall encourage and welcome Public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

- (i) Anyone acting in his own interest;
- (ii) Anyone acting on behalf of another person;
- (iii) Anyone acting as a member of, or in the interest of a group or class of persons;
- (iv) Anyone acting in the public interest, and
- (v) Association acting in the interest of its members or other individuals or groups."

³³ See Abiola Sanni "Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for Far-reaching Reform," 11 *Afr. Hum. Rts. L.J.* 511 2011, p.524.

³⁴ 197 US 11 (1905), cited in Abiola Sanni, *op.cit.*

³⁵For instance, it has been scholarly argued by Abiola Sanni, (*op. cit* at 528) that although paragraph 3(b) of the Preamble to the Fundamental Rights Enforcement Procedure Rules, 2009 mandates courts to 'respect' municipal (The fundamental Objectives and directive Principles of state policy and the African Charter), regional and international bills of rights (including CEDAW?) cited to it or brought to its attention or of which the court is aware, the word "respect" is ambiguous and imposes no definite obligation on the courts, else, the imperative word "shall" would have been used instead. At best, the statement is a mere persuasion and not a directive or compulsion on Nigerian courts to apply and enforce international human rights law (more so, in the light of the non-domestication provision in Section 12 of the Constitution) as it is in India (with judicial activism) and South Africa under its Bill of Rights.

“Nigerian laws on protection of women’s rights have been criticized for lacking the willingness to promote women’s right as they are inadequate, misinterpreted and unenforceable.”³⁶

This thesis therefore agrees with the recommendation/conclusion in one “appraisal” of the 2009 Rules that in spite of their simplification, for judges, legal practitioner and prospective litigants to benefit fully from its good intentions (manifest in its preamble), especially on *public interest litigations* and the expansion of *locus standi* in the enforcement of fundamental rights, the National Assembly must first amend Section 46 (1) of the 1999 Nigerian Constitution. Otherwise all the seemingly plausible provisions of the current Fundamental Rights (Enforcement Procedure) Rules 2009 will remain inferior, void and ineffective to the extent that it is inconsistent with Section 46 (1) of the 1999 Nigerian Constitution.³⁷ This argument is reasonable because Section 1(1), (2) and (3) of the 1999 Nigerian Constitution provides that:

(1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.

(2) The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.

(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

³⁶ N. I. Aniekwu ‘Legalising Cairo: Prospects and Opportunities for Reproductive Rights in Nigeria’ (2006) 1 & 2 CODESRIA Bulletin 49 (quoted in Uju Peace Okeke “A Case For The Enforcement of Women’s Rights As Human Rights in Nigeria”; The Women’s UN Report Program & Network (WUNRN) <http://www.wunrn.com> (16/7/2014).

³⁷ Aligba, A. (2011). Fundamental Rights (Enforcement Procedure) Rules 2009: An Appraisal, op. cit, at p.70.

Above all and as earlier stated in this chapter, there is no right of access to the Supreme Court of Nigeria for the enforcement of fundamental rights, except on appeal. This is not so with regards to the enforcement of *writ* petitions in the Supreme Court of India³⁸ or the Bill of Rights in the Constitutional Court of South Africa.³⁹

3.2.3 Limitation of Rights in the Nigerian Constitution

The 1999 Nigerian Constitution permits of much derogation of fundamental rights. In Nigeria, even the right to life is subject to limitation and derogation in time of emergency.

For instance, Section 33(1) of the 1999 Constitution guarantees the right to life but its sub-section 2 provides that a person shall not be regarded as having been deprived of his life:

if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary -

(a) for the defense of any person from unlawful violence or for the defense of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

(c) for the purpose of suppressing a riot, insurrection or mutiny.”

On the basis of the derogation of rights in the Nigerian Constitution, the Supreme Court held in *Medical and Dental Practitioners Disciplinary Tribunal v. Emewulu & Anor*⁴⁰ that all rights and freedoms are subject to limitations of overriding public interest or

³⁸ In India, the right of access to enforce fundamental rights is elaborately simple and devoid of any procedure whatsoever. A petitioner is at liberty to present his *writ* petition for the enforcement of fundamental rights before the Supreme Court under Article 32 or the state High Courts under Article 226. By the application of the Public Interest Litigation (PIL) in India, a *writ* petition may be commenced on the basis of a mere newspaper report, a personal letter addressed to a judge or even by the court *suo motu*.

³⁹ Section 34 of the South African Constitution provides that “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

⁴⁰ [2001] 3 S.C.N.J. 106.

state policy.⁴¹ This is not so in India⁴² or South Africa⁴³ where the three-step rule of constitutional proportionality applies to ensure that all legislative or executive actions of state which seek to limit or infringe a fundamental right must meet three basic criteria namely,

- (a) It must have an objective that is sufficiently and reasonably important to justify limiting the right in question;
- (b) The measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and
- (c) The means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.⁴⁴

Section 45 (1) of the Constitution also provide grounds upon which a law may be justified even if it restricts or derogates from positive fundamental rights. The Section provides thus:

Nothing in Sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society

- (a) in the interest of defence, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the rights and freedom of other persons.

⁴¹ See also Dada, J. A. (2012). Impediments to Human Rights Protection in Nigeria. *Ann. Surv. Int'l & Comp. L.*, 18, 67-92 at 77 where the learned author also cites media reports of extra-judicial killings which invariably occurred as a result of the constitutional derogations: *see Editorial Comment*, THE PUNCH, Aug. 13, 2009, at 14; *see also* SUNDAY TRIBUNE, May 19, 1991, at 1; NEWSWATCH, Aug. 24, 2009, at 10-18

⁴² In the case of *Khedat Majdoor Chetna Sanghat v. State of M.P.* (1995) SC 31, the Supreme Court of India observed that "If dignity or honour vanishes what remains of life?"

⁴³ With regards to the right to life and the right to human dignity, Section 37 (5) (c) of the South African Constitution provides that: ***No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise any derogation.***"

⁴⁴ Section 36 of the Constitution of South Africa which provide for the non-derogation of the rights in the Bill of Rights additionally provides a fourth precondition namely, that the state must ensure that there is no "less restrictive means to achieve the purpose."

Furthermore, Section 45 (2) provides that:

An act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of Section 33 or 35 of this Constitution; but no such measures shall be taken in pursuance of any such act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency.

Again, Section 6(6) (c) of the 1999 Nigerian Constitution clearly removes the authority of courts to enforce the enjoyment of the socio-economic rights contained as “directive principles” in the Constitution and without which, as in India, it is impossible to live life *with dignity*.⁴⁵ The said Section 6(6) (c) provides that:

The judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

Unfortunately, the sustainability and realistic enforcement of the rights to dignity and equality, as well as the right of access to justice and the independence of the judiciary in Nigeria is logically threatened by this non-justiciability provision. For instance, Sections 17 falls under the unenforceable directive principles of state policy in the Nigerian Constitution and its subsection (1) and (2) provides thus:

(1) The State social order is founded on ideals of Freedom, Equality and Justice.

⁴⁵ *Mukti Morcha v. Union of India*, (1984) 3 SCC 161; *Shantistar Builders v. Narayan K Totame, Shanti Star Builders case* (1990) 1 SCC 520.

(2) In furtherance of the social order-

(a) every citizen shall have equality of rights, obligations and opportunities before the law; **(b) the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced**; (c) governmental actions shall be humane; (d) exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented; and **(e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.**⁴⁶

It is, therefore, safe to conclude, with particular reference to Section 17(2) (b) and (e) of the Nigerian Constitution (above highlighted for emphasis), among others, that huge constitutional limitation and restrictions stand against the enforcement, promotion and protection of women's right to dignity and human rights generally in Nigeria.

3.2.4 Application of International Law

In Nigeria, the courts are not bound to apply international human rights law. This is because of the clear distinction which exists between “fundamental rights” which are enforceable and listed in Chapter IV of the 1999 Nigerian Constitution and “human rights” which are viewed as part of international treaty which Nigerian courts are not bound to apply unless and until they are domesticated into local legislation by enactment pursuant to Section 12 of the 1999 Nigerian Constitution.

The said Section 12 provides thus:

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

⁴⁶ Bold portions are for emphasis

In the case of *Sani Abacha v. Gani Fawehinmi*,⁴⁷ the Supreme Court interpreted Section 12 (1) of the 1979 Nigerian Constitution (the *ipissima verbis* of Section 12 (1) of the 1999 Nigerian Constitution) vis-à-vis international law thus:

Constitution is the supreme law of the land; it is the grundnorm. Its supremacy has never been called to question in ordinary circumstance. Thus, any treaty enacted into law in Nigeria by virtue of Section 12 (1) of the 1979 Constitution (now Section 12 (1) of the 1999 Constitution) is circumscribed in its operational scope and extent as may be prescribed by the legislature.⁴⁸

This suggests that Nigeria applies the *dualist* approach to treaty enforcement whereby international law is considered a separate form of law which is inferior to municipal law. So far, the constitutional non-domestication clause in Section 12 remains one of the reasons why the CEDAW provisions are not compelling in the Nigerian courts.

Similarly the non-justiciability of the directive principles of state policy in Section 6(6) (c) of the Nigerian Constitution makes it impossible for government to be bound by international law. For instance one of the non-justiciable foreign policy objectives in the fundamental objectives and directive principles of state policy in Nigeria is contained in Section 19 (c) and (d) of the 1999 Nigerian Constitution which provides that:

The foreign policy objectives shall be - (c) promotion of international co-operation for the consolidation of universal peace and mutual respect among all nations and *elimination of discrimination in all its manifestations*; (d) *respect for international law and treaty obligations...*

It is thus not much of a surprise that Nigeria's National Policy on Women, 2000, and later the National Gender Policy, 2006 (fashioned in line with the CEDAW) has also

⁴⁷ (2000) 6 NWLR 228.

⁴⁸ *Ibid* at 258.

remained comatose, and thus justifies the observation made by Nigeria's representative to CEDAW that Nigeria is "a country notorious for violating international agreements."⁴⁹

The application of CEDAW and other international human rights treaties would have been enforceable if Nigeria had adopted the *monist* approach which considers municipal law and international law as one and the same, and therefore international law may be applied directly within the municipal legal order since both seek to achieve the same goal.⁵⁰ This was much the argument of Mohammed, JSC in the *Abacha v. Fawehinmi* case when he held thus:

The African Charter on Human and Peoples Rights' (Notification and Enforcement Act, Cap 10 Laws of the Federation of Nigeria, 1990) is a statute with international flavour. Therefore, if there is a conflict between it and another statute, its provisions will prevail over those of that other statutes because for the reason that it is presumed the legislature does not intend to breach an international obligation. Thus it possesses greater vigour and strength than any other domestic statute.⁵¹

It is however, imperative that in determining the application or otherwise of international human rights law in Nigeria, the judiciary should have at the back of its mind, the clear and unambiguous provisions of the *pacta sunt servanda* in Article 26 of the Vienna Convention on the law of Treaties which provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" as well as Article 27 thereof which provides further that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

⁴⁹ Nwankwo, O. (2013). "Nigeria is notorious for violating international agreements." Lagos, Nigeria, Nigerian vanguard Newspaper, 22 September, 2013 <http://www.vanguardngr.com/2013/09/nigeria-is-notorious-for-abandoning-international-treaties-oby-nwankwo/> (26/9/2013).

⁵⁰ Dada, J. A. (2012). Impediments to Human Rights Protection in Nigeria. *Ann. Surv. Int'l & Comp. L.*, 18, 67-92, p. 73.

⁵¹ *Abacha v. Fawehinmi*, *supra* at 215.

3.2.5 Legal Aid

Legal aid is the provision of free legal services to those who cannot afford the cost due to poverty or other circumstance. Therefore, the importance of legal aid cannot be overemphasised in a country like Nigeria where, according to the Minister of Women Affairs and Social Development, Hajiya Zainab Maina, “70% of Nigerian women are living below poverty line”⁵² and can hardly afford the cost of litigation.

The 1999 Nigerian Constitution makes provision for legal aid.

Its Section 36 (1) provides that:

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

And in Section 46 (4) (b) it provides that:

The National Assembly - (b) shall make provisions-

- (i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim, and
- (ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.”

A careful perusal of Section 36 reveals that legal aid is not a positive right of its own, but is merely offered as an addendum to the right to fair hearing in Section 36 (6) (b) & (c) under which *inter alia*, every person “charged with a criminal offence” shall be

⁵² Daily Post, <http://dailypost.ng/2013/07/13/70-of-nigerian-women-are-living-below-poverty-line-minister/>. (22/4/2015).

entitled to adequate time and facilities for the preparation of his defence; and defend himself in person or by legal practitioner of his own choice.⁵³ It is therefore apparent from the phrase “charged with criminal offence,” that the Section does not intend nor pretend to cover persons (including women) who seek to litigate or defend their fundamental right to dignity in *civil* processes.

This is without prejudice to the fact that the right to fair hearing in Section 36 (1) of the Nigerian Constitution is stated to apply to a person “In the determination of his *civil rights and obligations*, including any question or determination by or against any government or authority.”

It is also obvious that the “legal aid provision” in the 1999 Nigerian Constitution, that is, Section 46 (4) (b) does not enshrine “legal aid” as a positive/fundamental right either. It merely empowers the National Assembly to *make provisions* for the *rendering of financial assistance* to any indigent citizen⁵⁴ *with a view to enabling him* to engage the services of a legal practitioner. It suffices that obligation of the state is not to *provide* legal aid (as it is in India by the interpretative power of judicial creativity and activism) but to *render financial assistance with a view to enabling him* provide or himself. What if, by the “Nigerian factor” the state claims not to have the capacity to render any financial assistance?⁵⁵

In Nigeria, the Legal Aid Council⁵⁶ is empowered under the Legal Aid Act⁵⁷ to render legal aid to “needy persons” charged under the Criminal Code (whether at first instance

⁵³ Section 36 (6) (b) & (c) of the Nigerian Constitution, 1999.

⁵⁴ Under Section 9 of the Legal Aid Act, only persons whose income do not exceed N1,500 (equivalent of USD 7.5 or MYR 27) per annum shall be granted legal aid. But where the person’s annual income exceeds the stated N1,500 he may get legal aid if he is willing to contribute to the funding [Section 9 (2)-(3)]. This is the level of legislative unreasonableness which is part of “the Nigerian factor” which inhibits the sustainable protection of the right to dignity of women and fundamental rights generally in Nigeria. Proverbially, this is like giving something with the left hand and taking it back with the right hand.

⁵⁵ The Indian Supreme Court held *inter alia*, in *Khatri v. State of Bihar*,⁵⁵ that the due process application of Article 39A (the equivalent of Section 46(4)(b) of the Nigerian Constitution) creates a continuing right to legal aid which attaches to the accused person from the time of his first arraignment before a magistrate up till his final appeal at the Supreme Court, and that it also creates an unqualified constitutional obligation on the state to provide the legal aid irrespective of any real or imagined administrative or financial constraints.

⁵⁶ The Legal Aid Council is a Federal government agency established by Decree No. 56 of 1976 as a corporate body with perpetual succession. The Council is empowered to establish branches in various states of the Federation. It is now regulated by the Legal Aid Act, Cap L9 Laws of the Federation of Nigeria, 2004 (An Act to provide for the establishment of the Legal Aid Council which is

or appeal) with murder, manslaughter, assault occasioning bodily harm, malicious or wilful wounding, aiding and abetting the commission of certain crime (or their equivalent under the Penal Code) as well as civil claims in respect of accidents but certainly not with respect to cases for the enforcement of fundamental rights including the right to human dignity. But in India, the right to free legal aid generally applies to *an accused person in a criminal trial*, as well as a petitioner seeking justice for the violation of her right to dignity or other fundamental rights under the broad interpretation of Article 21 of the Constitution of India.

It is, therefore, humbly submitted that since most Nigerian women are poor⁵⁸ and the inability to pay the cost of litigation is agreed to be the commonest reason why most people cannot seek redress for most violation of their rights,⁵⁹ legal aid in cases of violation of such important fundamental right as the right to human dignity would be ordinarily necessary to “widen the road” and ensure uninhibited access to justice as basic human right⁶⁰ necessary to guarantee protection of women’s right to dignity.

Given the current constitutional *lacuna* with respect to legal aid in Nigeria, it is most humbly submitted that the country urgently requires a creative and activist judiciary with the ingenuity, courage and fearlessness to give a *just, fair and reasonable*

responsible for the operation of a scheme for the grant of free legal aid in certain proceedings to persons with inadequate financial resources). The Act also establishes the Legal Aid Fund to enable the Council receive and utilize funds from the Federal and state governments, individuals, private and public charities and philanthropists to enable it carry out its activities (Section 3 of the Act).

⁵⁷ See second Schedule to the Legal Aid Act, Cap L9 Laws of the Federation of Nigeria, 2004.

⁵⁸ A recent study concluded that “there is every need to empower Nigerian women particularly in the present global economy which recognizes the need for individuals to develop their potentials and contribute to the overall development of the nations. Poverty will be reduced to the barest minimum if the government of Nigeria will take appropriate measures to implement and enforce laws and policies directed towards enabling women have the same rights as men” (Oduwale, T. A., & Fadeyi, A. O. (2013). Gender, Economic Activities and Poverty in Nigeria. *Journal of Research in Peace, Gender and Development (JRP GD)*, 2(7), 106-125. doi: <http://dx.doi.org/10.14303/jrpgd.2013.103> Available online at <http://www.interestjournals.org/JRPGD> (19/4/2015).

⁵⁹ “The possession of a right and consequently a right of action to sue are meaningless without reasonably affordable and accessible administration of justice system. Fair enough, the Nigerian Constitution has granted to the individual right of access to court or the legal right to litigate and defend claims. Law is an effective means of protecting legal rights and guarding against political, economic, social and other forms of injustice. However, the average individual may be hampered from obtaining justice in court by various factors... In Nigeria and elsewhere in Africa, poverty is a reality and the commonest hindrance to obtaining justice”: Malemi, E. (2012). *The Nigerian Constitutional Law (With Fundamental Rights Enforcement Procedure Rules, 2009)*. Lagos: Princeton Publishing Company, p. 545.

⁶⁰ S.L.A. Khan (2001) JUSTICE BHAGWATI ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES, *op.cit.*, p. 156.

interpretation of the relevant provisions of the Constitution⁶¹ which will redefine legal aid in Nigeria and elevate the protection of women's dignity to the standard in India where the Supreme Court insists that the violation of a woman's dignity is a violation of her life.⁶²

3.2.6 Critique of the Nigerian Constitutional Framework and the Way Forward

Thus far, this research has observed that the 1999 Nigerian Constitution contains a number of provisions which fundamentally inhibit the realization and protection of women's right to dignity and human rights generally. Worst of all, Nigerian courts have been conservative and not exhibited the requisite interpretative creativity and activism necessary to circumvent these constitutional *lacuna* or resurrect any of its dead provisions in order to promote and protect women's right to dignity.

Fundamentally, the lack of direct original access to the Supreme Court for the enforcement of fundamental rights constitutes a *lacuna* in Nigeria's constitutionalism. The import of this *lacuna* was explained by South African socio-economic and equality rights activist and academic Jackie Dugard, when she wrote thus: "Across the developing world, and particularly in Latin America, one of the mechanisms adopted to facilitate this access is enabling people to directly petition the highest court to defend their rights (rather than only arriving there, perhaps, after many appeals through lower courts)."⁶³

⁶¹ For instance, in the Indian case of *Hussainara Khatoon v. Home Secretary, State of Bihar* AIR 1979 SC 1369, Justice Bhagwati strengthened the earlier decision in *M.H. Hoscot v. State of Maharashtra* AIR 1978 SC 1548 by applying to it the *fair, reasonable and just* rule and observed that the right to legal aid is fundamental and may only become immaterial if the beneficiary refuses to accept it.

⁶² In the Indian case of *Khedat Majdoor Chetna Sanghat v. State of M.P.*, (1994) 6 SCC 260, the Supreme Court raised a poser itself thus: "If dignity or honour vanishes what remains of life?"

⁶³ See Jackie Dugard "Closing the doors of justice? The South African Constitutional Court's Approach to Direct Access." Published in Open Democracy/Open Global Rights of 25 May, 2015, Available at: <https://www.opendemocracy.net/openglobalrights/jackie-dugard/closing-doors-of-justice-south-african-constitutional-court%E2%80%99s-approac> (31/5/2015).

Specific fundamental gaps in the Nigerian Constitutional framework for the protection of women's right to dignity vis-à-vis international law and the Constitutional framework of India and South Africa are elaborated in Chapter 5 of this thesis. This researcher deems it unnecessary to recite them here.

And as for the way forward, this thesis strongly contends that, short of undertaking the onerous and near-impossible task of amending the fundamental rights provisions in Chapter IV of the 1999 Nigerian Constitution, only an independent, activist and creative judiciary can provide the needed sustainable remedy to bridge these gaps and set Nigeria on the path of sustainable reform.

Other specific and elaborate recommendations for bridging the fundamental gaps in the current Constitutional framework for the protection of women's right to dignity in Nigeria are contained in chapter 6, [6.4.1] (Recommendations for Constitutional Reform in Nigeria) of this thesis. The author sees no need to recite them here.

3.3 Constitutional Framework: INDIA

The protection of fundamental rights in Indian jurisprudence has an ancient origin. According to Rasool, 'in ancient India the State had a crucial role to play in the protection of human happiness and to ensure the promotion and protection of human rights in accordance with the supreme law, *dharma*.'⁶⁴

The philosopher author cited the Vedic culture (1500 to 600 B.C.) in which India "laid a solid foundation for an overriding importance of *Dharma* (just law) in private and public life. Since *dharma* was conceived as conducive for highest good and welfare of all, subordination of desire (*Kama*) and economic activities (*Artha*) to *dharma* moulded good behaviours of the king and his subjects."⁶⁵

⁶⁴ Rasool, D. I. (2015). Human Rights: Ancient Indian Jurisprudence. *Indian Journal of Legal Philosophy*, 3(2), 1-15.

⁶⁵ *Ibid* at 2.

Article 21 of the Constitution of India, 1950 guarantees the right to human dignity as part of the right to life and liberty. The major constitutional *lacuna* also, is the non-justiciability of the directive principles (as in the Nigerian Constitution). However, the creativity and activism of the Supreme Court of India in the “due process interpretation of fundamental rights” have made these non-justiciable rights enforceable and applicable as *implied* fundamental rights. Suffice it to say, that the advantage which the constitutionalism of the South African Bill of Rights enjoys over the Indian Constitution is levelled by the judicial activism of the Indian courts. This explains the reason why the Indian Supreme Court has been eulogised as ‘one of the most powerful Constitutional Courts in the world.’⁶⁶

3.3.1 The Right to Dignity of Women *Vis-a-vis* the Fundamental Objectives and Directive Principles of State Policy in the Constitution of India, 1950

In India, the right to dignity of women is protected under the “Right to life and personal liberty” in Article 21 of the Indian Constitution of 1950 which provides that: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

As in the 1999 Nigerian Constitution, the Indian Constitution also contains directive principles of state policy which are also declared non-justiciable by virtue of Article 37. However, by the art of judicial innovation and activism, the Indian Supreme Court equates *dignity* to *life* and thus defines and enforces these non-justiciable rights as *implied* fundamental rights, that is, the “minimum requirements which must exist in order to enable a person to live with *human dignity*.”⁶⁷ Accordingly, the right to human

⁶⁶ Cassels, J. (1989). Judicial Activism and Public Interest Litigation in India: Attempting the Impossible? *The American Journal of Comparative Law*, 495-519; Mate, M. (2013). Public Interest Litigation and the Transformation of the Supreme Court of India In D. Kapiszewski, G. Silverstein & R. A. Kagan (Eds.), *Consequential Courts: Judicial Roles in Global Perspective* (pp. 262-268). New York, USA: Cambridge University Press.

⁶⁷ *Bandhua Mukti Morcha v Union of India and Others* (The Bonded Labour) AIR 1984 SC 802

dignity in India is generally considered as part of a constitutional culture which upholds individual worth and value,⁶⁸ and all that goes along with it. Consequently, every breach of human dignity is a breach of right to life in India.⁶⁹ The importance of the honour and dignity of women in India was further underscored by the Indian Supreme Court in the case of *Khedat Majdoor Chetna Sanghat v. State of M.P.*,⁷⁰ when it raised a poser to itself thus: “If dignity or honour vanishes what remains of life?”

3.3.2 The Supreme Court of India *Vis-a-vis* Access to Justice for the Enforcement of Writ Petitions

But in India, the right to access to enforce fundamental rights is elaborately simple and devoid of any procedure whatsoever. A petitioner is at liberty to present his *writ* petition for the enforcement of fundamental rights before the Supreme Court under Article 32 or the state High Courts under Article 226.

The process is also not expensive because legal aid is interpreted as a justiciable right under the broad meaning of the right to life and personal liberty in Article 21 and the state is held accountable for its provision as a constitutional right,⁷¹ even up to the level of an appeal.⁷²

Also, with the development of the concept of Public Interest Litigation (PIL), the doctrine of *Locus Standi* in India has been neutralized to such an extent that a *Writ* petition for the enforcement of fundamental rights is deemed to have been properly filed even where the complaint is made on a mere letter written to a judge⁷³ or a newspaper report of the violation.⁷⁴ This is the dictum of *Epistolary jurisdiction of Courts* in India.

⁶⁸ Prem Shankar Shukla v. Delhi Admn (1980) 3 SCR 855.

⁶⁹ Per Justice Bhagwati in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors*, (1981)2 SCR 516.

⁷⁰ (1994) 6 SCC 260: AIR 1995 SC 31.

⁷¹ Per Justice Krishna Iyer in *M.H. Hoscot v. State of Maharashtra* AIR 1978 SC 1548.

⁷² *Khatri v. State of Bihar* AIR 1981 SC 928.

⁷³ *Mrs. Veena Sethi v. State of Bihar & Ors* AIR 1983 SC 339.

⁷⁴ *Keshavananda Bharati v. State of Kerala* AIR 1973 SC 1461.

The right to life and personal liberty in Article 21 is the bedrock of the Human Rights protection and enforcement in India. Through its positive approach, innovation and activism, the Indian judiciary remains steadfast as an institution for providing effective redress against human rights the violations.

By its liberal and compound interpretation of “life and personal liberty,” the courts have formulated and merged a plethora of rights.⁷⁵ In the old case of *A.K. Gopalan v State of Madras*,⁷⁶ the earlier Supreme Court had given a narrow definition to these concepts when it held that each Article in the fundamental rights provisions of the Indian Constitution dealt with separate unrelated rights which were mutually exclusive. But this view has thus far been reversed by the later Supreme Court which held in the celebrated case of *Maneka Gandhi v Union of India*⁷⁷ that the fundamental rights are related to each other and not mutually exclusive but form a single integrated scheme in the Constitution, stating that “the ambit of Personal Liberty by Article 21 of the Constitution is wide and comprehensive. It embraces both substantive rights to Personal Liberty and the procedure prescribed for their deprivation” which also must be fair, just and reasonable.

Additionally, India has two court-made rules which were formulated specifically to protect the dignity of women especially with respect to sexual abuse in custody and in their work places, namely, *The Rule in Sheela Barse* and *The Vishaka Guidelines*.

In *Sheela Barse v. Union of India*,⁷⁸ the Supreme Court of India formulated guidelines in the absence of legislation, for the protection of the dignity and sexual independence of women in custody, based on a Class Action Litigation (CAL). These guidelines became known as *The Rule in Sheela Barse*.

⁷⁵ This is traceable to the practice in ancient Indian philosophy whereby the protection of all individuals were defined as the *Dharma* of the king, which obliged the king to prosecute or extradite violators for breach of *Dharma* irrespective of their socio-religious or economic standing positions. Further to this duty, the king was obliged to invent and apply necessary strategies for the effective promotion and protection of all rights.-See Rasool, D. I. (2015). Human Rights: Ancient Indian Jurisprudence. *Indian Journal of Legal Philosophy*, 3(2), 1-15 at 4.

⁷⁶ A.I.R 1950 SC p.27.

⁷⁷ A.I.R 1978 SC p.597.

⁷⁸ AIR 1987 (1) 153.

And in *Vishaka & Ors v. State of Rajasthan*,⁷⁹ the Supreme Court of India performed its “law making” role when it formulated *guidelines* for the protection of women against sexual violation at their workplaces, in the absence of legislation. These guidelines became popular *The Vishaka Guidelines*, and they have been promulgated into the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Accordingly, the gaps in the existing law are filled by the evolution of juristic principles, which in due course of time get incorporated into the law of the land thereby promoting its development.⁸⁰ It is therefore realistic and reasonable that the Supreme Court of India has been cited alongside the Constitutional Courts of South Africa and Colombia as “consequential courts” which are agents of transformative change and democratization in the “global south.”⁸¹

3.3.3 The Right to Equality: Article 14

The principle of gender equality is enshrined in the preamble,⁸² Fundamental Rights provisions⁸³ as well as the Fundamental Duties and Directive Principles in the Indian Constitution, 1950 (as modified up to 1st December, 2007) which encourages government to adopt and pursue measures of positive discrimination in favour of women.⁸⁴

Article 14 specifically provides that “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

⁷⁹ AIR 1997 SC 3011.

⁸⁰ Babu, S. R. (2013). Contribution of the Supreme Court to the Growth of Democracy In India. *NUJS Law Review*, *NUJS L. Rev.* 6.

⁸¹ Maldonado, D. B. (2013). *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*: Cambridge University Press.

⁸² The Indian Constitution seeks “to secure” to all its citizens”: “JUSTICE”; “EQUALITY of status and of opportunity”; and “assuring the dignity of the individual.”

⁸³ Articles 12-35 of the Indian Constitution contain the Fundamental Rights.

⁸⁴ Women’s Rights Initiative, CONSTITUTIONAL AND LEGAL PROVISIONS FOR WOMEN IN INDIA, National Legal Research Desk. http://nlrd.org/womens-rights-initiative/legislations-laws-related-to-women/constitutional-and-legal-provisions-for-women-in-india?subscribe=success#blog_subscription-2_. (13/7/2014).

And Article 15 (1) and (2) prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them; or cause any Indian citizen to suffer disability, liability, restriction or condition with regards to the use and enjoyment of public infrastructure.

Badjena⁸⁵ examined the legislative framework for the protection of the right to dignity of women with regards to rape and sexual violence against women with disabilities in India and concluded that disabled women and girls are more vulnerable to suffer indignity, humiliation and abuse than the other women. The author noted that the principle of gender equality is enshrined in the Preamble, Fundamental Rights, Fundamental Duties and Directive Principles in the Indian Constitution, including the mandate on the State to adopt measures of positive discrimination in favour of women but that Articles 14, 15 and 16 of the Indian Constitution does not include disability as a ground for non-discrimination.

However, constitutional protection of persons with disability and sickness is made in Article 39A of the Directive Principles of State Policy in Chapter-IV of the Constitution which obliges the State to promote a legal system which “promotes justice, on a basis of equal opportunity,” and, “in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”⁸⁶

Furthermore, Article 41 enjoins the State to ensure the provision of the right to work, education as well as the right to public support and assistance in the event of unemployment, old age, sickness and disablement, within the limits of economic capacity. Already, by sheer art of judicial activism and innovation in constitutional and fundamental rights interpretation in India vis-à-vis the right to life and personal liberty,

⁸⁵ Badjena, S. S. (2014). "Sexual Violence against Women with Disabilities and the Legislative Measures in India." ODISHA REVIEW (April-May 2014): 46-57.

⁸⁶ The Indian Legislature has also promulgated the People With Disability Act which sufficiently clears every doubt and takes care of any gaps inherent in the constitutional provisions on gender equality for people with disabilities in India.

these principles are being enjoyed as justiciable positive rights in India. This is a big lesson for Nigeria to follow.

3.3.4 Right to Legal Aid

Poverty and inability to pay for the services of an attorney are common reasons why most women cannot seek legal redress for certain abuses and violation of rights. Studies also show that Poverty is not a gender neutral condition as the number of poor women exceeds that of men in most third world countries⁸⁷ and it is even “nearly universal across affluent Western democracies” where inherent structural factors tend to feminize poverty and threaten gender equality.⁸⁸

Therefore, legal aid is necessary to “widen the road” and ensure uninhibited access to justice as a basic human right necessary to guarantee women’s right to dignity and freedom and human rights generally.⁸⁹

Article 39A of the Indian Constitution obligates the State to ensure that the legal system promotes equal justice to all by providing “free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

Ordinarily, Article 39A is caught in the web of non-justiciability and it was so applied by the Supreme Court in the early days of the Indian Constitution. At that time, the scope of legal aid was restricted to the right of the applicant to engage the services of a lawyer of his choice and not a right to be offered the services of a lawyer at the expense of the state.⁹⁰ However, according to Khan,⁹¹ the courage and interpretative activism of

⁸⁷ Bastos, A., Casaca, S. F., Nunes, F., & Pereirinha, J. (2009). Women and poverty: A gender-sensitive approach. *The Journal of Socio-Economics*, 38(5), 764-778; Shaffer, P. (1998). Gender, poverty and deprivation: evidence from the Republic of Guinea. *World Development*, 26(12), 2119-2135; Quisumbing, A. R., Haddad, L., & Peña, C. (2001). Are women overrepresented among the poor? An analysis of poverty in 10 developing countries. *Journal of Development Economics*, 66(1), 225-269.

⁸⁸ Brady, D., & Kall, D. (2008). Nearly universal, but somewhat distinct: The feminization of poverty in affluent Western democracies, 1969–2000. *Social Science Research*, 37(3), 976-1007.

⁸⁹ S.L.A. Khan (2001) Justice Bhagwati on Fundamental Rights and Directive Principles, *op.cit.*, p. 156.

⁹⁰ Tara Singh v. State, AIR 1951 SC 441; Janardhan Reddy v. State of Hyderabad, AIR 1951 SC 217.

⁹¹ S.L.A. Khan, (2001) Justice Bhagwati on Fundamental Rights and Directive Principles, *op.cit.* p. 155.

the later Supreme Court with the likes of Justice P.N. Bhagwati caused the right to free legal aid to be read into and enforced as part of the fundamental rights.

Thus, in *M.H. Hoscot v. State of Maharashtra*,⁹² Krishna Iyer, JSC, held that the state was bound to provide free legal aid to an indigent, or incommunicate person as a constitutional right, if the circumstance and justice of the case permits. However, in *Hussainara Khatoon v. Home Secretary, State of Bihar*⁹³ Justice Bhagwati strengthened the decision in *Hoscot* by applying to it the *fair, reasonable and just* rule and observed that the right to legal aid is fundamental and may only become immaterial if the beneficiary refuses to accept it. He further expanded this concept by holding in *Khatri v. State of Bihar*,⁹⁴ that the due process application of Article 39 creates a continuing right to legal aid which attaches to the accused person⁹⁵ from the time of his first arraignment before a magistrate up till his final appeal at the Supreme Court, and that it also creates an unqualified constitutional obligation on the state to provide the legal aid irrespective of any real or imagined administrative or financial constraints.

Since legal aid is considered a constitutional fundamental right in India, it thus logically follows, as with all other constitutional rights, that the plaintiff cannot even on his own volition waive or surrender the enjoyment of the constitutional right in favour of the respondents. In the case of *Nar Singh Pal v. Union of India & Ors*,⁹⁶ the Supreme Court cautioned that “Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppels against the exercise of Fundamental Rights available under the Constitution,” as doing so would amount to a breach of public policy. Remarkably too, the benefit of legal aid under the Indian

⁹² AIR 1978 SC 1548.

⁹³ AIR 1979 SC 1369.

⁹⁴ *Khatri v. State of Bihar*, AIR 1981 SC 928.

⁹⁵ It must be borne in mind that although the right to free legal aid so far discussed generally applies to *an accused person* in a *criminal trial*, it can also be inferred in respect of a woman seeking justice for the violation of her right to dignity under Article 21.

⁹⁶ AIR 2000 SC 1401.

Constitution applies also to social action groups and voluntary organisations that render legal aid services and benefits to the deserving public, especially at the grassroots.⁹⁷

3.3.5 Limitation of Rights in the Indian Constitution

Article 19 (2)-(6) of the Indian Constitution permits reasonable executive, legislative or administrative action which seeks to limit the enjoyment of certain rights.

The permissible limitation of rights however does not include the right to dignity or life in India.⁹⁸ In the case of *Om Kumar & Ors v. Union of India in Delhi Development Authority v. Skipper Construction & Anor*⁹⁹ the Indian Supreme Court applied what is now described as “The Three-Step Rule of Constitutional proportionality.” The Supreme Court explained the rule thus:

By ‘proportionality’, we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve. The legislature and the administrative authority are however given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.¹⁰⁰

⁹⁷ *Centre for Legal Research v. State of Kerala* 3 SCJ 1986 SC 17.

⁹⁸ Article 19(1) lists the affected rights to include the right to freedom of speech and expression; freedom to assemble peaceably and without arms; freedom to form associations or unions; freedom to move freely throughout the territory of India; freedom to reside and settle in any part of the territory of India and freedom to practise any profession, or to carry on any occupation, trade or business within the territory of India.

⁹⁹ [2001] 4 LRI 1049.

¹⁰⁰ Paragraph 29, page 12 of the judgement. This three-step test was re-affirmed in Malaysia by the Federal Court Per Dato’ Gopal Sri Ram FCJ in *Sivarasa Rasiah v. Badan Peguam, Malaysia* [2010] 2 MLJ 333, (FC) at para 30 at p 351 where his Lordship held thus:

“[A]ll forms of state action-- legislative or executive measure — that infringe a fundamental right must:

(a) have an objective that is sufficiently important to justify limiting the right in question;

(b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and

(c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.”

It suffices that ‘reasonable restrictions’ which the State could impose on the fundamental rights should not be arbitrary or of an excessive nature, beyond what is required for achieving the objects of the legislation. Therefore, legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it struck a proper balance between the rights guaranteed and the control permissible under arts 19(2) to (6). Otherwise, it must be held to be wanting in that quality.¹⁰¹

Generally, in determining the proportionality of any legislative or administrative restrictions to fundamental rights (of course not including the right to life and dignity of women in India), the burden of proof lay on the state to show that the restriction was reasonable and proportionate. And in arriving at a decision on the proportionality and reasonableness or otherwise of a restriction or limitation, the High Court or Supreme court “must keep in mind the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition as well as the prevailing conditions of the time.”¹⁰²

3.3.6 Application of International Law

The Indian Constitution does not contain any specific provision which obliges the application of international human rights law in the Indian Courts.

However, by its uncommon creativity and activism, the Indian Supreme Court applied international human rights law in formulating the *Vishaka Guidelines* which protected women’s dignity against sexual harassment at the workplace, at a time when there was no legislation on the subject.

¹⁰¹ See Mahajan J, (as he then was) in *Chintaman Rao v State of Uttar Pradesh* [1950] SCR 759.

¹⁰² See the observation of Patanjali Sastri CJ in *State of Madras v. V Row* [1952] SCR 597, as well as that of Jeevan Reddy J in *State of AP v Mc Dowell & Co* (1996) 3 SCC 709.

According to the Court:

Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the judiciary in the LAWASIA region. [T]hese principles were accepted by the Chief Justices of the Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary.¹⁰³

The Court observed that it also relied on two provisions of the CEDAW namely Article 11 which enjoin State Parties to take all appropriate steps to ensure equality at work, safe working conditions and eliminate discrimination against women in the workplace and Article 24 which enjoin State Parties to apply all necessary measures at the national level to ensure the full realization of the rights recognised in the CEDAW. This is an ingenious and commendable judicial way to apply international human rights law for the protection of women's dignity even where municipal law offers no direct remedy.

In that case, the court also emphasised that the consideration of "International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein." The judgment of August 1997 was given by a bench of Justices headed by J. S. Verma (then Chief Justice of India).

¹⁰³ *Vishaka & Ors v. State of Rajasthan & Ors*, JT 1997 (7) SC 384.

By this finesse of judicial activism, especially in the “just, fair and reasonable” interpretation of constitutional provisions on fundamental rights, the Indian Supreme Court has brought fundamental rights guaranteed in the Constitution at par with international human rights. Accordingly, Indian courts do not apply the dogmatic approach which is common in Nigeria where the courts are obliged not to apply international law unless they are first domesticated as part of municipal law,¹⁰⁴ and that even where a conflict arises between the African Charter on Human and People’s rights vis-à-vis the Nigerian Constitution, that the African Charter must give way.¹⁰⁵

3.3.7 Critique of the Indian Constitutional Framework

In relation to the right to dignity of women and fundamental rights generally, one of the prominent gaps in the Indian Constitution is that the rights contained in the directive principles are not rather enshrined as positive or fundamental rights, as it is in the South African Bill of Rights.

The Indian Constitution also makes no distinct provision for the guarantee of women’s reproductive right as a specific fundamental right outside the right to life and liberty. This is without prejudice to Article 42 which directs the state to make provisions for just and human conditions of work and maternity relief. However, with regards to the sexual and reproductive rights of women in the global south generally, including India, some scholars especially Unnithan and Pigg¹⁰⁶ have expressed the view that “rights have arrived but justice has not followed”.

The Indian Constitution also does not specify that international human rights law should be mandatorily applied in all courts or tribunals, as is common in the South African

¹⁰⁴ Section 12 of the 1999 Nigerian Constitution.

¹⁰⁵ *Abacha v Fawehinmi* (2000) 6 NWLR (Pt. 660) 228.

¹⁰⁶ Unnithan, M., & Pigg, S. L. (2014). Sexual and reproductive health rights and justice—tracking the relationship. *Culture, health & sexuality*, 16(10), 1181-1187.

Constitution. It has however been severally mentioned in this research that the innovation and activism of the Indian Supreme Court has sufficiently bridged these gaps by interpreting, defining, applying and enforcing the directive principles as *implied* fundamental rights and also connecting women's right to dignity and reproductive health to the right to life and liberty in Article 21.

Though the Supreme Court of India is considered as "one of the most activist judiciaries in the world,"¹⁰⁷ however, the Court's activism, especially with regards to social action litigation (SAL), has been criticised as being undemocratic, ineffective, judicial grandstanding and a violation of the principle of separation of powers.¹⁰⁸

3.3.8 The Way Forward

In his *Outlines of Indian Legal and Constitutional History*, M.P. Jain remarked that "The judicial system, on the whole, is tolerably adequate [...] Despite all achievements a few serious defects [...] have become time-honoured as they have persisted for so long."¹⁰⁹

This statement clearly buttresses the need for certain recommendations, albeit slight, for the strengthening of the Indian Constitutional framework, including its "tolerably adequate" judicial advances for protecting the dignity of women and human rights generally. But even in such rare cases, the Indian Supreme Court had formulated and applied the *Doctrine of Curative Petition* further to and as an extension of Article 137 of the Constitution. By this doctrine, a petitioner is entitled to question a final judgement even after the dismissal of the review petition¹¹⁰ under Article 137. In a judgement of

¹⁰⁷ Rajagopal, B. (2007). Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective. *Human Rights Review*, 8(3), 157-186.

¹⁰⁸ Upendra Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of (In)Justice" in S.K.Verma and Kusum (eds.) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press, Delhi, 2000) at 161.

¹⁰⁹ Quoted in Badami, N., & Chandu, M. (2014). Access to Justice in India. In *Institutional Competition between Common Law and Civil Law*, Chapter 7(pp. 211-235). Springer Berlin Heidelberg.

¹¹⁰ Review Jurisdiction of Supreme Court of India: Article 137 Electronic copy available at: <http://ssrn.com/abstract=2169967> (29/8/2014). This paper however concludes that the doctrine of curative petition which basically permits a second review "may not seem to be reasonable... particularly when there is no eminent necessity or demand to do so.(See *ibid* at 18).

far reaching consequences in *Rupa Ashok Hurra v. Ashok Hurra*¹¹¹, the Supreme Court held, per S.P Barouche, then CJI, that ‘though the judges of the highest court do their best subject to the limitation of human fallibility yet situations may arise, in the rarest of rare cases, which would require reconsideration of a final judgement to set right miscarriage of justice.’ In that case, a five-man Constitution bench of the Supreme Court unanimously held that in order to rectify gross miscarriage of justice in its final judgement which cannot be challenged, the court will allow *curative petition* by the victim of miscarriage of justice to seek a second review of the final order of the court.¹¹²

It is also specifically recommended that the Indian Constitution be amended to enshrine the non-justiciable ESC rights currently referred to as Directive Principles of State Policy as *positive* fundamental rights, even though they presently apply as *implied* fundamental rights by reason of the consequential interpretative activism and creativity of the Indian Supreme Court.

It should also provide specifically for the guarantee of the reproductive rights of women, and declare the application of international human rights law obligatory in all courts or tribunals among others. These improvements will place Indian constitutionalism at par with that of South Africa and reduce the seeming dependence on judicial creativity and activism for the protection of women’s right to dignity in India. After all, according to two Indian scholars, “while we might have rights-enhancing judgments from courts that interpret the Constitution expansively, these judgments do not transform structures of injustice.”¹¹³

¹¹¹ AIR 2002 SC 1771.

¹¹² So long as the petitioner establishes a genuine violation of principle of natural justice, fear of the bias of the judge and judgment that adversely affected him. Additionally, the petition must accompany certification by a Senior Lawyer relating to the fulfilment of the requirements.

¹¹³ Sircar, O., & Mandal, S. (2013). What's law got to do with justice? *Infochange Agenda, March* (26), 2-6 at 3.

3.4 Constitutional Framework: SOUTH AFRICA

The Constitution of South Africa enshrines the civil and political rights, economic, social and cultural rights as well as environmental rights as *positive* justiciable rights in its Bill of Rights. Consequently, with respect to the guarantee and protection of human rights, the Constitution is acclaimed to be one of the best in the world!¹¹⁴ This is in addition to the South African Constitutional Court which Heinz Klug has extolled for its ‘transformative constitutionalism,’¹¹⁵ ‘generous interpretation of rights’ and ‘judicial pragmatism rather than the symbolic judicial activism.’¹¹⁶ At the formal inauguration of the Constitutional Court, then President Nelson Mandela described it as ‘a court South Africa has never had, on which hinges the future of our democracy.’¹¹⁷

3.4.1 The Right to Dignity of Women in the Constitution of the Republic of South Africa, 1996

Section 10 of the Bill of Rights in the Constitution of South Africa 1996 guarantees women’s right to dignity thus: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

However, unlike in India and Nigeria, the Bill of Rights in the South African Constitution enshrines both the first and second generation of rights as justiciable positive rights, thus guaranteeing all other bundle of rights which make life worth living and with dignity. It suffices that these rights stand independently and do not derive their efficacy from judicial activism and interpretative innovation or any *implied application* as is obtained in India. This character places the South African Constitution far ahead of

¹¹⁴ Moseneke, D. (2012). "32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa, The *Geo. LJ* 101: 749.

¹¹⁵ Sunstein, C. R. (2001). Social and economic rights? Lessons from South Africa. *John M. Olin Program in Law and Economics Working Paper No. 124*, p. 4.

¹¹⁶ Klug, H. (2013). Constitutional Authority and Judicial Pragmatism, Politics and Law in the Evolution of South Africa’s Constitutional Court. *Consequential Courts: Judicial Roles in Global Perspective*. New York, USA, Cambridge University Press: 93-113.

¹¹⁷ Presidential Speech at the formal inauguration of the South Africa Constitutional Court, 15th February, 1994. <http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases> (Accessed on 7/6/2013).

those of Nigeria and India, and explains why its Preamble note contains the following statement: “South Africa belongs to all who live in it, united in our diversity.”¹¹⁸

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state as well as both natural or juristic persons.¹¹⁹ Section 8(3) of the South African Constitution enjoins courts to apply and if need be, develop the common law to ensure full protection of the rights contained in the Bill of Rights, in the event that municipal law is short on any such right.

Section 39 of the Constitution further mandates courts when interpreting the Bill of Rights, to ensure that they promote the common values of an open and democratic society based on human dignity, equality and freedom, as well as international law. This means that the CEDAW does not suffer the fate of non-implementation due to non-domestication which is the situation under Section 12 of the 1999 Nigerian Constitution. The Bill of Rights also recognizes other rights or freedoms conferred by common law, customary law or legislation, as long as they do not derogate from the Bill of Rights. It further enjoins courts to promote the spirit, purport and objects of the Bill of Rights when developing legislation, common law or customary law.

Section 184(3) of the South African Constitution also obligates non-judicial bodies to monitor and superintend the performance/compliance of government and its agencies with the enforcement of socio-economic and environmental rights. The said Section provides that:

Each year, the South African Human Rights Commission must require relevant organs of state to provide the commission with information on the measures they have taken towards the realization of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment.

¹¹⁸ See Breen, D., & Nel, J. A. (2014). South Africa-A home for all: The need for hate crime legislation. *South African Crime Quarterly*, 38, 33-43.

¹¹⁹ Section 8 of the Constitution of South Africa.

With particular reference to the right to dignity of the girl-child in particular and children generally,¹²⁰ the Constitution of South Africa ranks among the best in the world. According to Warren Binford,¹²¹ the Constitution of South Africa 1996 represents an unrivalled ground-breaking advancement in the guarantee of children's rights. This is because, for the first time, 'children's rights were robustly and comprehensively recognized in the express language of a nation's Constitution rather than 'primarily through statutes, case law, and international treaties, with only occasional recognition of specific rights such as the right to primary education and certain family rights found in the express language of Constitutions.' The author emphasises that apart from South Africa, 'no country had promulgated a Constitution that recognized children as a unique population of rights holders with numerous specific rights beyond those held by adults'¹²² and that this rare advancement also places South African Courts, especially the Constitutional Court above the courts in other jurisdictions which 'interpreted their Constitutions to recognize children's rights (albeit these rights are usually limited in both number and scope relative to adults).'¹²³

It is also logical and reasonable to assert that the fact that Section 39 (1)(b) of the South African Constitution mandates courts to consider and apply international law in making decisions while Section 233 enjoins them to always prefer a statutory interpretation which favours international law as against one that does not, it presupposes as Warren Binford rightly said that South African children not only enjoys rights protection under the municipal law but they also enjoy those guaranteed internationally under the UN

¹²⁰ The emphasis of this thesis is particularly on the rights of the "female" or girl-child.

¹²¹ Binford, W. (2015). The Constitutionalization of Children's Rights in South Africa: 1994-2014. *New York Law School Law Review*, 59(2).

¹²² In addition to some of the universal rights embodied in the Bill of Rights including housing (Section 26); health care, water, sanitation and social security (Section 29), the South African Constitution uses clear, emphatic and unambiguous language to oblige the state to ensure the protection of children-specific rights guarantees in its Section 28. For purpose of this thesis, these includes *inter alia*, the obligation to protect the child against "maltreatment, neglect, abuse or degradation" (Section 28(1) (d), and "exploitative labour practices" (Section 28 (1) (e), which would otherwise certainly derogate the dignity of the girl-child.

¹²³ Binford, W. (2015). The Constitutionalization of Children's Rights in South Africa: 1994-2014, *op.cit.*

Convention on the Rights of the Child, the African Children's Charter and other international treaties which South Africa has subscribed to.¹²⁴

This form of advanced constitutionalism in the protection of the right to dignity of the girl-child represents a good lesson for both Nigeria and India, even though Indian courts remarkably apply their creativity and activism to bridge even the most insidious legislative or constitutional *lacuna*.

3.4.2 The Constitution of South Africa *Vis-a-vis* Access to Justice for the Enforcement of the Right to Dignity in the Constitutional Court

South Africa has elaborate guarantee of fundamental rights in the Bill of Rights in its Constitution of 1996. The Bill of Rights is considered a cornerstone of South Africa's democracy and it affirms the core values of human dignity, equality and freedom¹²⁵ and the state is obliged to "respect, protect, promote and fulfil" these rights.¹²⁶

Accordingly, the strength of constitutionalism in South Africa lies more on the Bill of Rights and independence of the South Africa Constitutional Court than on the overall judicial innovation and activism as it is in India. This is because the need for judicial activism is considerably reduced because the Bill of Rights says it all. The Constitutional Court, short of *formulating guidelines in the absence of legislation*, as in India, merely ensures that the provisions of the Bill of Rights are interpreted to conform to the dictates of international law on human rights and equality.

Section 10 of the Constitution of the Republic of South Africa provides that:

Everyone has inherent dignity and the right to have their dignity respected and protected.

¹²⁴ See Binford, W. (2015). The Constitutionalization of Children's Rights in South Africa: 1994-2014, *ibid*, p. 11.

¹²⁵ Chapter 2, Section 7(1) of the 1996 South Africa Constitution.

¹²⁶ Section 7(1) *ibid*.

With respect to the dignity right of children, (and for our purpose, the girl-child), Section 28 (1) (a) and (d) of the South African Constitution are imperative. They provide thus:

Every child has the right to (a) a name and a nationality from birth; (d) to be protected from maltreatment, neglect, abuse and degradation.

It must be noted that the specific right of children in Section 28 of the South African Constitution are to be enjoyed in addition to some of the rights (with respect to adults) contained in the Bill of Rights as well as in international and regional instruments ratified by South Africa.¹²⁷

According to Julia Sloth-Nielsen & Benyam Mezmur, even ‘the Constitutional Court in its first decision affirmed dignity as a founding principle of the court generally, and then held that the dignity rights of children have heightened importance.’¹²⁸

Section 12(1) of the Constitution guarantee the right to freedom and security of the person to be free from “all forms of violence from both public and private sources”, as well as the right not to be treated or punished in a “cruel, inhuman or degrading way” while Section 12(2) is particularly protective of women’s physical and psychological integrity and reproductive rights thus:

Everyone has the right to bodily and psychological integrity which includes the right to (a) make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.

¹²⁷ Binford, W. (2015). The Constitutionalization of Children's Rights in South Africa: 1994-2014, *ibid*, p. 11.

¹²⁸ Sloth-Nielsen, J., & Mezmur, B. D. (2008). 2+ 2= 5-Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006). *Int'l J. Child. Rts.*, 16, 1 at 24-25.

Environmental rights which are negative rights in the Nigerian Constitution and implied rights in the Indian Constitution are justiciable rights in Section 24 of the South African Constitution.

The Women's Charter for Effective Equality, 1994 combines with the Bill of Rights and the peculiar independence of the Constitutional Court to offer sustainable protection for the dignity of women in South Africa.

Article 1 of The Women's Charter provides severally that:

The responsibility to ensure that the principle of equality informs all aspects of our lives shall not be limited to the state but shall be borne by all, including employers, family members and civil society.

The State shall establish appropriate mechanisms to ensure the effective protection and promotion of equality for women, which shall be accessible to all women in South Africa.

Section 167 of the South African Constitution permits a person to bring an action directly to the Constitutional Court or to appeal directly to the court, in exceptional cases, when it is in the public interest and with leave of the Constitutional Court. It is therefore reasonable that the independence and effectiveness of the Supreme Court of India and the Constitutional Court of South Africa has been identified as the backbone of legislation for safeguarding the dignity of women and inching progressively towards the "constitutionalism of the Global South."¹²⁹

¹²⁹ Daniel Bonilla Maldonado(Ed), *Constitutionalism of the Global South: The Activist tribunals of India, South Africa, and Colombia*, (2013) Cambridge University Press, New York, USA, p.4.

3.4.3 Limitation of Rights in the South African Constitution

Generally, it can be argued that there is practically no limitation of rights under the South African Constitution. This is because Section 36(1) of the Constitution provides stringent and near impossible criteria which must be met before such limitation can be permissible.

By the provisions of the said Section 36(1),

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

Aside the above onerous conditions, Section 36 (2) provides that “no law may limit any right entrenched in the Bill of Rights.” With specific regards to the limitation of the right to dignity and the right to life, Section 37 (5) (c) of the Constitution of South Africa provides that even where a state of emergency is lawfully declared by an Act of Parliament under Section 37 (1) to restore peace and order, or at a time when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency,

No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise any derogation from the right to Human dignity in Section 10 and the right to life in Section 11 of the South African Constitution.

This is similar to the Three Step Rule of Constitutional Proportionality¹³⁰ developed by the Indian Courts as a check to the practical application of Article 19(2)-(6) of the Indian Constitution which permits limitation and restrictions to certain fundamental rights (not including the right to dignity or life).¹³¹ However, the criteria of *less restrictive means to achieve the purpose* in Section 36 (1) (e) places the South African version ahead of India's.

It is thus arguably affirmed that there is practically no limitation of rights contained in the Bill of Rights in the 1996 South African Constitution.

3.4.4 Application of International Law

Section 39 of the South African Constitution makes the application of international law mandatory and compelling in all courts, forum or tribunals hearing and interpreting the Bill of Rights. The said Section 39 provides thus:

(1) When interpreting the Bill of Rights, a court, tribunal or forum (*a*) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (*b*) **must consider international law**; and (*c*) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Accordingly, there is no difference between the rights enshrined in the South African Bill of Rights on the one hand and the human rights guaranteed in the Charter of the United Nations and other international human rights instruments on the other hand.

¹³⁰ See *Om Kumar & Others v. Union of India in Delhi Development Authority v. Skipper Construction & Anor* [2001] 4 LRI 1049, *op.cit.*.

¹³¹ Article 19(1) lists the affected rights to include the right to freedom of speech and expression; freedom to assemble peaceably and without arms; freedom to form associations or unions; freedom to move freely throughout the territory of India; freedom to reside and settle in any part of the territory of India and freedom to practise any profession, or to carry on any occupation, trade or business within the territory of India.

This is unlike in Nigeria where a clear distinction is made between “fundamental rights” which are enforceable and listed in Chapter IV of the 1999 Nigerian Constitution and “human rights” which are viewed as part of international treaty which Nigerian courts are not bound to apply unless and until they are domesticated as part of the municipal law under Section 12 of the Nigerian Constitution, and even upon domestication, the African Charter (the African regional human rights Charter) has been declared inferior to, and not at par with the Nigerian Constitution¹³² *vide* Section 1(1) and (3) thereof which affirms its supremacy and that “*if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.*”

Furthermore, Section 233 of the Constitution of South Africa requires a court when interpreting legislation to “*prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*”

Under the Constitution of South Africa, even sensitive matters like state security must also conform to international Law. In Section 200 (2) it provides that: “the primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.” Section 199 (5) also provides that the “security services must act, and must teach and require their members to act in accordance with the Constitution and the law, including customary international law and international law binding on the Republic.”

¹³² *Gani Fawehinmi v. Gen. Sanni Abacha* (2000) 4 SC (Part II) 1.

It is significant that South Africa is the only country in Africa which enshrines the application of international law in its Constitution¹³³ thereby leaving the courts with no discretion whether or not to apply international law when interpreting municipal law.

It is also significant that the Constitution of the Republic of South Africa, Act 108 of 1996 was signed into law by President Nelson Mandela on Human Rights Day, 10th December 1996 at Sharpeville, the scene of the massacre of African demonstrators against the apartheid laws in 1960.¹³⁴ John Dugard¹³⁵ thus concludes that “the South African Constitution seeks to ensure that South Africa law will evolve in accordance with international law.”

3.4.5 The South Africa Constitutional Court

South Africa has an independent Constitutional Court which is the highest court in the land and whose jurisdiction is solely for constitutional matters. At its inauguration, former President Nelson Mandela proudly described the Constitutional Court as ‘a court like no other, on which hinges the future of our democracy.’¹³⁶ Most Justices of the Constitutional Court acknowledge that one of the core values inherent in the South African Constitution is *Ubuntu*, that is, ‘social harmony and healing.’¹³⁷

In furtherance of the right to dignity of women, the Constitutional Court recognized gender equality in marriage and inheritance as basic constitutional rights in the cases of *Shilubana & Others v. Nwamitwa*¹³⁸ and *Elizabeth Gumedé v. President of the Republic*

¹³³ Oppong, R. F. (2006). Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa. *Fordham International Law Journal*, 30(2), 269-345 at 323. (citing Tiyanjana Maluwa, The Incorporation of International Law and Its Interpretational Role in Municipal Legal Systems in Africa: An Exploratory Survey, 23 S. AFR. Y.B. INT'L L. 45,46 (1998) who was also citing Gerhard Erasmus, The Namibian Constitution and the Application of International Law, 15 S. AR. Y.B. INT'L L. 81, 93 (1989-1990)).

¹³⁴ Dugard, J. (1997). International law and the South African Constitution. *Eur. J. Int'l L.*, 8, 77-92 at 92.

¹³⁵ John Dugard, *ibid* at 78.

¹³⁶ See President Nelson Mandela's Speech at the Inauguration of the Constitutional Court on 14 February 1995 in Johannesburg. <http://hooyberglaw.wordpress.com/2013/12/06/president-nelson-mandelas-speech-at-the-inauguration-of-the-constitutional-court/>, (24/7/2014).

¹³⁷ Mark Kende, (2006). “President Nelson Mandela's Constitutional Law Legacy” in Human Rights, International Relations and Globalization published by Grupo Editorial Ibanez, 2006, <http://www.law.drake.edu/clinicsCenters/conLaw/docs/recentMaterials-mandelaLegacy.pdf> (24/7/2014).

¹³⁸ (2008) ZACC 9.

of *South Africa & Ors*¹³⁹ respectively. In other landmark judgments including *Government of the Republic of South Africa v. Grootboom*¹⁴⁰ and *Minister of Health v. Treatment Action Campaign*¹⁴¹ the Court confirmed that the socio-economic rights to housing and health respectively were basic fundamental rights.

In matters relating specifically to the rights of children, (and for our purpose, the right to dignity of the girl-child), the South African Constitutional Court has also taken “the most definitive decisions”¹⁴² in emphasising and considering the *welfare* and *best interest of the child*, even in matters where the child is not a party. For instance, in *S v. M (Centre for Child Law as Amicus Curiae)*,¹⁴³ a single mother was convicted of theft and fraud and sentenced to four years imprisonment. However, because there will be no one to take care of her three children while she is in prison, the Constitutional Court converted her sentence to a non-custodial sentence and further urged courts to always consider the best interests of the child during every sentencing, especially what impact the incarceration of a parent(s) will have on the child(ren).

It must be noted that the decision of the court may be varied by the peculiar circumstance of each case. Invariably, where a spouse or other care-giver or guardian will be available to take care of any child(ren), the court would readily impose or confirm a custodial sentence on a convicted parent. This was the case in *MS v. S*¹⁴⁴ where the Constitutional Court imposed a custodial jail sentence on a woman whose husband was available at home to take care of their children in her absence.

Most interestingly, the protection of the dignity rights of children, including the girl-child in South Africa was taken to a higher plane in the case of *J v. National Director of*

¹³⁹ (2008) ZACC 23.

¹⁴⁰ [2000] ZACC 19.

¹⁴¹ Case No. CCT/8/02, Heard on 2, 3 and 6 May 2002, Decided on 5 July 2002.

¹⁴² Binford, W. (2015). The Constitutionalization of Children's Rights in South Africa: 1994-2014, *op.cit.*, p. 11.

¹⁴³ 2008 (3) SA 232 (CC).

¹⁴⁴ 2011 (2) SACR 88 (CC).

*Public Prosecutions & anor (Childline South Africa and others as amici curiae)*¹⁴⁵

where the Constitutional Court held *inter alia*, that it is in the paramount best interests of child sex offenders that they have a right not to be identified by name nor have their names included on the lists of sex offenders. All these confirm that the Constitutional Court is, indeed, a global model in the protection of right to dignity of the girl-child as well as women's fundamental rights and constitutionalism generally.

3.4.6 Critique of the South African Constitutional Framework and the Way Forward

It has been stated in this research that the South African Constitution of 1996 contains a formidable Bill of Rights which has been widely acclaimed as meeting the widest standard of international human rights law.

The South African Constitutional Court is also acclaimed as “a consequential court” with regards to constitutional matters and matters relating to human rights as elaborately enshrined in the Bill of Rights. In spite of these praises, the South African Constitutional Court has also been criticized on two major points.

Firstly, a prominent judge of the Constitutional Court, Justice Dikgang Moseneke has observed that ‘the tardiness of government implementation and the institutions in implementing court orders promptly and effectively remains a consistent threat to our constitutionalism.’¹⁴⁶ He cited the case of *Government of RSA & Ors v. Grootboom*¹⁴⁷ where the Constitutional Court had ordered the state to provide suitable alternative housing to the applicant but this order was not carried out until the applicant had died.

Secondly, pro-poor South African author and socio-economic and equality rights activist, Jackie Dugard has criticised the Constitutional Court for being anti-poor and

¹⁴⁵ 2014 (7) BCLR 764 (CC).

¹⁴⁶ Moseneke, D. (2012). 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa, *The. Geo. LJ*, 101, 749.

¹⁴⁷ [2000] ZACC 19.

‘likely to become increasingly elite,’ having ‘failed to utilise the direct access mechanism to proactively select—not to mention to proactively seek out—deserving direct access cases from socio-economically disadvantaged groups.’¹⁴⁸

Jackie Dugard argued that the intention of the constitutional provision allowing direct access to the Constitutional Court when it is “in the interests of justice” is simply to protect the socio-economically disadvantaged class, but that this essence is fundamentally defeated because in the first twenty years of its existence between 1994 and 2014, the South African Constitutional Court “only granted direct access in 18 cases” whereas the ‘Constitutional Court of Costa Rica hears approximately 17,000 direct access applications each year (called *amparos*) and the Colombian Constitutional Court hears about 450 direct access applications each year (called *tutelas*).’¹⁴⁹ It is thus imperative that the South African Constitutional Court needs to hear more number of cases and be more pro-poor by making itself more accessible to the socially disadvantaged.¹⁵⁰

This thesis further suggests that the South African Constitution be fine-tuned to allow direct access to the Constitutional Court, even without leave, as it is applicable in India by judicial creativity and activism.

This thesis contends, therefore, that the latitude of access jurisprudence for the enforcement of fundamental rights in India is wider and preferred to that of South Africa because apart from the dictum of epistolary jurisdiction of courts, the *writ* petitioner in India has an unhindered constitutional right to choose bringing his original action before a High Court or direct to the Supreme Court. Needless to say that there is no similar right of direct access to the Supreme Court of Nigeria.

¹⁴⁸ Jackie Dugard “Closing the doors of justice? The South African Constitutional Court’s Approach to Direct Access.” Published in Open Democracy/Open Global Rights of 25 May, 2015. Available at: <https://www.opendemocracy.net/openglobalrights/jackie-dugard/closing-doors-of-justice-south-african-constitutional-court%E2%80%99s-approac> (31/5/2015).

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

This researcher also agrees with the recommendation of Justice Moseneke that the Constitutional Court should always set a deadline or time frame for its orders and directives to be carried out and that both individual and state violators should be punished severely. This is to make the Constitutional Court more pragmatic and consequential and strengthen the framework for protecting the dignity of women and human rights generally in South Africa. Anything less may diminish and dilute the effective protection of the ESC Rights guaranteed in the Bill of Rights and may therefore upset the pragmatism and transformative credence of the court¹⁵¹ as well as constitutionalism in South Africa.

3.5 Conclusion

The Constitutional framework for the protection of women's right to dignity and human rights generally in India is quite impressive and superior to the Nigerian framework. Although it is not as water-tight as the South African Constitutional framework, the activism and creativity of the Indian judiciary in the interpretation of relevant fundamental rights provisions have effectively and reasonably bridged any inherent gaps in its constitutional framework. These advances provide many lessons for Nigeria.

The sustainable enjoyment of women's right to dignity in particular, and human rights generally, rests also upon the *positive* justiciability of socio-economic rights and environmental rights as is manifest in the Bill of Rights in the South African Constitution.

However, the Constitutions of Nigeria and India expressly declare socioeconomic rights and environmental rights as non-justiciable. But while these rights remain unenforceable *negative rights* in Nigeria, they have become enforceable as *implied rights* in India by virtue of the independence, creativity and activism of the Indian

¹⁵¹ Moseneke, D. (2012) *op.cit.*

Supreme Court. Thus, by the standard indices of international human rights law, constitutionalism and the courts in India and South Africa have become “consequential courts in the Global South,”¹⁵² leaving Nigeria far behind in reforms.¹⁵³

This researcher holds the view that it may be an almost impossible feat for the Nigerian legislature to make the non-justiciable rights justiciable by constitutional amendment.

The reason for this difficulty lie in Section 9 (3) of the 1999 Nigerian Constitution which make it almost impossible to obtain the mandatory number of federal and states parliamentary support necessary to effect any such amendments to the fundamental rights provisions in Chapter IV thereof. The opinion has been reasonably and rightly expressed that such constitutional amendment bottlenecks can only be resolved by the amendment of the amendment-provision of the 1999 Constitution:¹⁵⁴ It is thus humbly suggested that judicial innovation and creativity be applied as the very best reasonable and immediate option to effectively bridge both constitutional and other legislative inadequacies which hinder the general protection of human rights, as is common in India.

However, with specific reference to sexual and reproductive rights of women in the Global South generally, some scholars have expressed the view that most human rights frameworks “increasingly pervade” global health policies and programmes, leaving one with the reasonable belief that “rights have arrived but justice has not followed.”

¹⁵² Maldonado, D. B. (2013). *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, Cambridge University Press.

¹⁵³ Dada, J. A. (2012). "Impediments to Human Rights Protection in Nigeria." *Ann. Surv. Int'l & Comp. L.* **18**: 67; Dada, J. A. (2013). "Human Rights Protection in Nigeria: the Past, the Present and Goals for Role Actors for the Future." *Journal of Law, Policy and Globalization* **14**: 1-13; Dada, J. A. (2013). "Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal." *Journal of Law, Policy and Globalization* **10**: 1-18; Ibe, S. (2014). "Expanding the space for economic, social and cultural rights in Nigeria: feature." *ESR Review: Economic and Social Rights in South Africa* **15**(2): 3-4; Gwangudi, V. M. (2002). "Problems Militating against Women's Access to Justice in Nigeria." *University of Maiduguri Law Journal* (5): 13-14; Okogbule, N. S. (2005). "Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects." *SUR-Int'l J. on Hum Rts.* **3**: 95; Vincent, N. and N. Kenneth (2014). "Nigeria and the Attainment of Sustainable Development in the 21st Century." *Mediterranean Journal of Social Sciences* **5**(4): 645.

¹⁵⁴ Ofo, N. (2011). Amending the Constitution of the Federal Republic of Nigeria 1999. *African Journal of Legal Studies*, **4**(2), 123-148.

CHAPTER 4

LEGISLATIVE AND POLICY FRAMEWORK FOR PROTECTING THE RIGHT TO DIGNITY AND SEXUAL INDEPENDENCE OF WOMEN IN NIGERIA, INDIA AND SOUTH AFRICA

4.1 Introduction

In this Chapter the researcher examines the legislative and policy framework for the protection of the right to dignity of women in Nigeria, India and South Africa, with special regard to the Criminal jurisprudence on rape and other violation of the sexual dignity of women at home, in the workplace or the open space. It also examines the Nigerian Gender Policy, 2006 as well as certain remarkable political steps taken by the Government of India to advance access to justice and empowerment in the protection of women's and dignity. With regards to the girl-child in Nigeria, the Child Rights Act is also examined.¹

It must be noted that the African Charter (Ratification and Enforcement) Act, Cap 10, Laws of the Federation of Nigeria, 1990 is the domesticated version of the regional human rights instrument, the African Charter on Human and Peoples' Rights, 1981. Since the African Charter was elaborately discussed in Chapter two of this thesis, there is no further discussion of Cap 10, Laws of the Federation of Nigeria, 1990.

However, with specific reference to India, this chapter has *inter alia*, examined certain legislation on dowry and sex-selection.

Two major legislation on violence against women which seeks to protect women and the girl-child's right to dignity and sexual independence and against any form of

¹ Two other national legislations which relate to women are National Laws on the Rights of Women and Girls in Nigeria Trafficking in Persons (Prohibition) Law-NAPTIP Act 2003 and the Trafficking in Persons (Prohibition) Law Enforcement and Administration (Amendment) Act, 2005. However, they are not considered here because Trafficking in persons is outside the scope of this thesis.

violence in South Africa are also examined in this chapter. They are the Domestic Violence Act, 116 of 1998 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007. The discussion of these legislation is premised on the fact that a violation of a woman's dignity, especially her sexual dignity amounts to gross violence.

The Chapter also makes a critique of Nigeria's, India's and South Africa's legislative and policy framework for the protection of women's right to dignity and makes recommendations for the way forward in each case.

4.2 Legislative and Policy Framework: NIGERIA

The Nigerian legal system is an offshoot of English legal system but while English laws are dynamic and have been developed to meet most rapid changes, their Nigerian counterparts have largely remained static. Thus, Nigeria is saddled with laws that are in some cases eighty years old and have not been revised to respond to the contemporary situations, among them, the dignity and empowerment of women. As a federal republic, each of Nigeria's 36 States has its own State House of Assembly² which has powers to draft its own legislation, subject to a Federal legislation on the same subject or the provisions of the 1999 Constitution.³

However, the fact of being a federation as well as the practice of a tripartite system whereby civil law, customary law and religious law apply simultaneously makes it quite difficult to harmonise or eliminate most discriminatory socio-cultural practices cum religious mythologies which ignore, eliminate or diminish women's rights including the rights to dignity and equality.⁴ Consequently, die-hard adherents of customary law and

² Section 90 of the 1999 Nigeria Constitution provides that "There shall be a House of Assembly for each of the States of the Federation".

³ Section 100 (1) of the 1999 Nigerian Constitution provides that "The power of a House of Assembly to make laws shall be exercised by bills passed by the House of Assembly and, except as otherwise provided by this Section, assented to by the Governor".

⁴ http://genderindex.org/country/nigeria#_ftn1 (13/5/2015).

Islamic law *status quo* observe practices and myths, even if they are unfavourable to women's constitutional rights to life, dignity, marriage, inheritance or movement.⁵

Unfortunately, the bill, [Abolition of all Forms of Discrimination against Women in Nigeria and other Related Matters Bill] was debated and later abandoned by Nigeria's National Assembly in the mid- 2000s. Regrettably, as at the date of this research, the Nigerian National Assembly did not pass that bill into law, nor did it pass any other Federal bill prohibiting violence against women. Hence, Nigeria has no law against domestic violence even though it has ratified the CEDAW and the African Union Protocol on the Rights of Women in Africa, albeit both international instruments remain "undomesticated" and of no legal effect.⁶

4.2.1 The National Human Rights Commission of Nigeria

The National Human Rights Commission was established by the National Human Rights Commission (NHRC) Act, 1995, as amended by the NHRC Act, 2010, in line with the resolution of the United Nations General Assembly which enjoins all member States to establish national human rights institutions for the promotion and protection of human rights. The Commission serves as an extra-judicial mechanism for the enhancement of the enjoyment of human rights. Its establishment is aimed at creating an enabling environment for the promotion, protection and enforcement of human rights. It also provides avenues for public enlightenment, research and dialogue in order to raise awareness on human rights issues.⁷

The complaint mechanism of the commission can be accessed by all victims of human rights violation in Nigeria or by their agents. The complaint may be submitted online or

⁵ Ojilere, A., & Gan, C. C. (2015). Learning from the Indian Judiciary: New Directions for Securing Nigerian Women's Right to Dignity. *Asian Women*, 31(1), 81-106, at 87.

⁶ By Section 12 of the 1999 Nigerian Constitution contains the domestication provision that no international treaty "shall have the force of law" unless and until "any such treaty has been enacted into law by the National Assembly."

⁷ OECD Development Centre (2014). Social Institution and Gender Index (SIGI): Nigeria. <http://www.nigeriarights.gov.ng/> (4/11/2014).

in writing to the Executive Secretary, at any office of the National Human Rights Commission in Nigeria. A complaint may also be submitted orally to a representative of the Commission at the offices of the Commission. Where this is so, the representative will reduce it into writing and the victim or his agent will then sign or thumb-print the same. Every such written or transcribed submission must bear the complaint's full information, the facts in support of his claim, as well as the relief sought.⁸

The Act was amended by the National Human Rights Commission (Amendment) Act, 2010. Under the amendment, the Commission became independent in the conduct of its affairs and its recommendations and awards were recognized and enforced as decisions of a High Court of a state.

This amendment though appealing, is still deficient considering that fact that the decision of a state High Court in Nigeria is subject to appeal to a Court of Appeal and finally to the Supreme Court of Nigeria. This researcher thus envisages and recommends that the Act be further amended to make the award and recommendations of the Commission at par with the judgement of a Court of Appeal, or even as a final judgement of the Supreme Court, similar to the constitutional powers of the South African Constitutional Court or the Supreme Court of India with respect to matters relating to the Bill of Rights. This will introduce direct right of access to the Commission with respect to human rights violations, thereby complementing the regular functions of courts rather than encroaching on them.

Furthermore, the establishment and powers of the Commission should take root in the Nigerian Constitution, just as in the case of the Human Rights Commission in India.

⁸ National Human Rights Commission, Nigeria. <http://www.accessfacility.org/national-human-rights-commission-nigeria>. (4/11/2014).

There is also need to establish Human Rights Commissions in the various states of Nigeria as in India too, so as to bring justice closer to a woman in the event of a breach of her right to dignity.

4.2.2 The Criminal Jurisprudence on Rape

The law relating to rape in Nigeria is rarely discussed even though rape occurs very often and is considered as the most dehumanizing act that can be done on a woman or girl.⁹ The opinion has also been held that Nigerian female victims of rape are rather punished by the laws that be and stigmatized by society instead of being rendered justice to and protected.¹⁰

Rape is one of the sexual offences known to the Nigerian criminal jurisprudence.¹¹ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) considers rape as a form of discriminatory violence against women¹² Article 1(g) of the Rome Statute of the International Criminal Court recognizes rape as a crime against humanity.¹³

The Black's Law Dictionary¹⁴ describes rape as "unlawful sexual intercourse with a female without her consent; The unlawful carnal knowledge of a woman by a man forcibly and against her will; The act of sexual intercourse committed by a man with a woman not his wife and without her consent, committed when the woman's resistance is overcome by fear, or force, or under prohibitive conditions."

⁹ Aydin v. Turkey, 23178/9 (1997) ECHR, 75 25 September 1997

¹⁰ Ogba, Onwuchekwa Chidinma, *Rape Victims: Re-defining the law governing rape in Nigeria*. University of Ado-Ekiti Law Journal 2010 Vol. 4 p.28

¹¹ Other sexual offences include indecent assault, defilement, incest, child pornography, offences against public decency and morality, carnal knowledge against the order of nature etc. contained in Chapter 20 of the Criminal Code Act Cap C38, Laws of the Federation of Nigeria, 2004 (applicable in Southern Nigeria).

¹² Activities for eliminating all forms of violence against women and girls are guided by UN Women's global strategic plan 2011-2013 Development Results Framework goal 3: To Prevent Violence Against Women and Girls and expand access to services <http://www.unwomenpacific.org/pages.cfm/our-programmes/evaw/>

¹³ The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949, pp.287-288) also states that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

¹⁴ 6th edition page 1260

By Section 357 of the Criminal Code,¹⁵

Any person who has unlawful carnal knowledge of a woman or girl, without her consent or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm or by means of false and fraudulent presentation as to the nature of the act or in case of a married woman by impersonating her husband is guilty of an offence which is called Rape.

And under Section 282 of the Penal Code,¹⁶

A man is said to commit rape who has sexual intercourse with a woman:

- i. Against her will
- ii. without her consent
- iii. with her consent when her consent has been obtained by putting her in fear of death or of body harm.
- iv. With her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is believed herself to be lawfully married.
- v. with or without her consent, when she is under fourteen years of age or of unsound mind.

The above provisions merely underscore the ingredients of the offence of rape without actually giving a succinct and detailed definition of it. This is unlike the law in Section 1(1) of the Sexual Offences Act of England and Wales 2003 which defines rape in clear terms as an offence which is committed when a *person intentionally penetrates the vagina, anus or mouth of another person with a part of his body or anything else*.

Following the definitions of rape in Nigeria where the Penal Code uses the phrase *sexual intercourse* and the Criminal Code uses *carnal knowledge* in describing the

¹⁵ Cap C38, Laws of the Federation of Nigeria, 2004 (Applicable in Southern Nigeria).

¹⁶ Cap 345, Laws of the Federation of Nigeria, 1990 (Applicable in Northern Nigeria and the Federal Capital Territory, Abuja).

offence, it has been plausibly argued that by the phrases used, the Penal Code creates a limitation because it points to a male or man penetrating the vagina of a woman or girl with his manhood or penis while under the criminal code, it embraces every rape victim, be it male, female or child and with any kind of instrument, be it penis, objects or with an animal.¹⁷ Suffice to say that the core elements of rape in Nigeria, and all of which the prosecution must prove beyond reasonable doubt in order to secure a conviction for rape are as follows:

1. Legal capacity of the accused as to his age
2. Penetration, as *actus reus*
3. Lack of consent by the victim/survivor
4. Marital/Spousal Rape exemption

The requirement of age/legal capacity of the accused is premised on the irrebuttable common law presumption of law that a child under the age of seven is *doli incapax*, that is, incapable of forming the *mens rea* for the commission of any crime (including rape). Another irrebuttable presumption of law is that a boy who below the age of twelve is incapable of having carnal knowledge of a woman, and therefore cannot be convicted of the crime of rape.

Similarly, since by its statutory definition, rape is an offence committed against a woman or a girl, and never a man or a boy, it follows that no woman can be convicted of raping a man or boy, and no man can be convicted of raping another man, no matter the circumstance. However, it is noteworthy that a person who lacks the capacity to commit rape may be convicted of aiding, abetting, counseling or procuring the commission of rape.¹⁸

¹⁷ See Ogba, Onwuchekwa Chidinma, *Rape Victims: Redefining the law governing rape in Nigeria*. University of Ado-Ekiti Law Journal 2010 Vol. 4 *op.cit* at p.251

¹⁸ S.P.F. Harris, *Principles of the Criminal Law*, 13th Ed. Sweet & Maxwell, London 1919, p. 166.

In Nigeria, penetration is considered the *actus reus* of rape, that is, the actual physical sexual intercourse. In the case of *Edet Okon Iko v. The State*,¹⁹ the Supreme Court held *inter alia* that the essential and most important element of rape is penetration, and that unless and until even the slightest penetration is proved, the prosecution must fail.

Also, in *Jegede v. The State*²⁰ Belgore, JSC (as he then was) stated the law as follows: A person does not have to put in the whole of his penis into the girl's vagina before he is said to have intercourse with the girl; in law, a mere penetration is enough to constitute the offence of rape. This is why even where penetration was proved but not of such a depth as to injure the hymen, it has been held to be sufficient to constitute the crime of rape, albeit the prosecutrix who is allegedly defiled is found to be *virgo intacta* (i.e. a Virgin).

However, Nigerian Courts sometimes apply unreasonable “patriarchal” logic and give conflicting decisions on cases of rape and sexual violations to the woman's dignity. For instance, in *Aiki v. Idowu*,²¹ the Nigerian Supreme Court held that, in the absence of evidence that rape of a four year old girl was likely to endanger her life; the defendant, who had raped her to death, could not be convicted of murder by virtue of Section 326(3) of the Criminal Code since the *mens rea* of rape is not to kill or cause death and therefore, ordinarily speaking, a case of murder rather than manslaughter cannot be easily established against the offender.²²

¹⁹ (200) 14 NWLR (Pt. 732) 221, per Iguh, JSC.

²⁰ (2000) 7 SCNJ 135 at 141

²¹ (2006) All FWLR (Pt. 239) 361,

²² And in *Upahar v The State*, (2003) 6 NWLR (Pt. 816) 230, the accused persons were charged with rape and abetment of rape respectively. The evidence against them by the victim/survivor was that the 1st Appellant pulled off his shorts, tore her pant, laid her down in the bush and while the 2nd appellant held her legs apart, the 1st appellant lay on her naked, and did everything necessary to unlawfully have carnal knowledge of her. The medical report of examinations carried out on the victim/survivor read thus: “perineal examination revealed normal external genitalia, tender vulva with whitish secretion; the hymen was lax lacerated but there was no active bleeding.”

The court accepted as a fact that the 2nd appellant held the victim's legs apart while the 1st appellant took out his penis and inserted into her vagina but went ahead to hold that since neither the medical report nor the eye witness could corroborate the actual act of penetration, penetration was therefore incomplete, and consequently reduced the appellants convictions to attempted rape and abetment of attempted rape respectively.

With regards to *Aiki v Idowu*, this researcher humbly contends that the Supreme Court was wrong on the question whether rape of a four year old was likely to endanger her life. No evidence is necessary; the court should have taken judicial notice of that obvious reality. Common sense and a glancing acquaintance with psychobiology would lead to the conclusion that rape of a four year old child by an adult male was definitely life threatening.

Again, the *mens rea* of rape is an intention to have sexual intercourse without the woman's consent. It follows that proof of consent or the lack of it is very material to the fate of the accused person. Consent is therefore an exculpatory legal defence to a rape charge, and as long as the consent pleaded was obtained voluntarily and genuinely.²³

The import of Section 357 of the Criminal Code and Section 282(1) (a)-(e) of the Penal Code is that the *mens rea* of rape is satisfied where the woman's consent to the sexual intercourse was obtained by force, threats or intimidation of any kind, or by fear of harm or by means of fraudulent representation as to the nature of the act, or by impersonating the victim's husband. Another critical fact of Nigeria's law on rape is the exemption of marital/spousal rape from the definition of rape.

In summary, the combined effect of Section 6 and Section 357 of the Criminal Code is that a man cannot be guilty of raping his wife.

Section 6 provides, in part, that: *Unlawful carnal knowledge means carnal connection which takes place otherwise between husband and wife.* In the same vein, Section 282(2) of the Penal Code provides that: *Sexual intercourse by a man with his own wife if she has attained puberty.*

According to A. O. Yusuf,²⁴ "it is assumed that by reason of marriage, both the husband and the wife enter into a mutual matrimonial contract, which includes an advance and irrevocable access to their bodies and consent to have sexual intercourse with each other."

The Nigerian criminal jurisprudence therefore dilutes the right to dignity and sexual

And on the Court of Appeal decision in *Upahar*, I agree entirely with the thinking that the court was actually looking for proof of virginity instead of proof of penetration, more so, when earlier decisions had specifically emphasized that the slightest penetration of the vagina with the penis was sufficient proof whether or not there was evidence of broken or lacerated hymen (See Ngozika Orji: *Proof of Sexual Offences in Nigeria*, UNIZIK Law Journal vol. 7 No. 1, 2010, p.310).

²³ (See Sunday Jegede v The State (2001) 14 NWLR (Pt. 733, 264; Iko v The State (*supra*))

²⁴ *Gender Inequality and selective victimization under the Nigerian Law of Rape*, Ahmadu Bello University, Zaria Journal of Private and Comparative Law (JCPL) Vol. 2 & 3, 2007-2009 p.101; Reference has always been made to the words of Sir Matthew Hale in the History of the Pleas of the Crown, vol. 1, p. 629 to the effect that "...the husband cannot be guilty of rape committed by himself against his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."

independence of women by fueling the misconception that marriage is the prescribed avenue for the satisfaction of innate impulse, particularly in man; hence, no manner of sexual intercourse within marriage should be considered offensive.

Technically, even the Nigerian law of evidence also places the woman-victim of rape “on trial” and in a precariously weak position at the trial of her violator.

Section 211 of the Evidence Act provides thus:

When a man is prosecuted for rape or for attempt to commit rape or for indecent assault, it may be shown that the woman against whom the offence is alleged to have been committed was of a generally immoral character, although she is not cross-examined on the subject; the woman may in such a case be asked whether she has a connection with other men, but her answer cannot be contradicted and she may also be asked whether she had connection on other occasions with the prisoner, and if she denies it may be contradicted.

This simply means that if it is found that the victim had previously had sex with other men or even the accused person in the past, the court would invariably hold that she had volunteered her consent to the present act constituting the alleged rape. This paper will later show that the evidence of rape under the Criminal Law (Amendment) Act, 2013 of India offers better protection which does not place a rape victim on a similar “trial”.

Again, by Section 179(5) of the Nigerian Evidence Act: “A person shall not be convicted of the offences mentioned in paragraph B of the subsection 1 of Section 51 or 218, 221, 223, or 224 of the Criminal Code upon the uncorroborated testimony of one witness.”

Generally, by law and practice, the evidence of the victim of rape must be corroborated to sustain a conviction for the offence.

However, the judge must make it clear that he has the risk in question in his mind – what is necessary is that the judge’s mind upon the matter should be clearly revealed.

Under the said Evidence Act, there is no requirement that an accused standing trial for rape cannot be convicted on uncorroborated evidence of one witness. However, over the years the common law principles have been that evidence of the prosecutrix needs to be corroborated or at best, the court will be wary to convict on such uncorroborated evidence.²⁵

In the case of *Simon v. Police*,²⁶ Adetokunbo Ademola, J (as he then was) succinctly put the position of the law in Nigeria thus: “it is not a rule of law in Nigeria that in sexual offenses accused person should not be convicted on the uncorroborated evidence of a prosecutrix, that the court may after paying attention to the warning nevertheless convict if they are satisfied of the truth.”²⁷ This rule of practice arises out of the unconfirmed belief that women would deliberately lie about being assaulted to explain away premarital intercourse, infidelity, pregnancy or to retaliate against a lover.

Accordingly, the burden on the prosecution to corroborate the testimony of the prosecutrix by independent evidence is heavy and tasking to the extent that even when a prosecutrix testified that the accused inserted his penis into her vagina, it is not enough and there must be corroboration by an independent witness of what the prosecutrix testified before.²⁸

There is a second reason for the rule for corroboration in sexual cases, namely, because these cases are particularly subject to the danger of deliberate false charge resulting from sexual neurosis, fantasy, jealousy spite or simply a girl’s refusal to admit that she consented to an act of which she is now ashamed.

²⁵ In this book, *Proof of Guilt*, Glanville Williams noted that “the rule is that the jury must be directed that it is dangerous to convict a person for any sexual offence based on the uncorroborated testimony of one witness.” See Glanville Williams, *Proof of Guilt*. The Hamlyn Trust Lectures, Stevens & Sons Ltd, London 1955, p. 122

²⁶ (1951) WLNLR 23

²⁷ Also, in *Ukut v. State* (1965) 1 NRNLR 306 it was said that in sexual offences including rape, the court should wary to convict an accused without corroboration, but in *State v. Ogiondiegion* (1968) 1 NMLR 117 it was stated that the requirement of corroboration of evidence of the prosecutrix is not required but that the judge must warn himself on the risk of convicting of such evidence alone.

²⁸ See *Idris Rai v. The State* (2005) 7 NWLR (Pt. 925) 491 at 512.

In general the requirement of corroboration in sexual cases follows the same rule as for accomplice evidence of detail. The danger of convicting on the evidence of an accomplice who is trying to minimize his own part in the affair is obvious even to an unintelligent person. In sexual cases on the other hand, the danger is usually not obvious.

Moreover, there is tendency in sexual cases for the proceedings to start with prejudice against the defendants, if the complainant is a girl of tender years whose appearance makes a strong appeal to the sympathy and protective feelings of the court. In the light of modern psychology the technical rule of corroboration seem but a crude and childish measure, if it be relied upon as an adequate means for determining the credibility of the complaining witness in such charges.²⁹

The point must also be underscored that many countries have recognised that there is little justification for the requirement of corroboration and that it seriously impedes the conviction of sexual offenders and have thus done away with this requirement for sexual crimes e.g. Canada, United Kingdom, New Zealand and India.³⁰

Furthermore, Section 183(3) of the Nigerian Evidence Act requires that no person shall be convicted upon the unsworn testimony of a child unless it is corroborated by some other supporting material implicating the accused person.

It is trite that sexual offences fall under the category of offences where corroboration is required either as a matter of law or of practice. For some offences such as defilement, it is specifically provided that the court cannot convict based on the uncorroborated testimony of one witness, while for other offences such as rape, out of practice, the judge is required to caution the jury, or himself where there is no jury, that it is unsafe

²⁹ However, a research on rape by the Malaysian NGO, All Women's Action Society (AWAM) showed that it is very rare for women to report rape because of current prosecution practice, the stigma as a rape survivor and their psychological desire to forget about the crime. Therefore these beliefs are in actual fact, false. See page 26 of the MEMORANDUM ON LAWS RELATED TO RAPE IN MALAYSIA (PROPOSALS FOR AMENDMENTS) Submitted by the Anti-Rape Task Force, Prepared by All Women's Action Society (AWAM); Women's Centre for Change, Penang (WCC); Sisters in Islam (SIS); Women's Aid Organization (WAO); Protect and Save the Children (P.S. the Children) *September 2003*.

³⁰ See Memorandum on Amendments to Laws Related to RAPE, op. cit. page 27.

to convict based on the uncorroborated evidence of one witness.

This double requirement for corroboration under the law for sexual offences against the child makes the task of prosecuting the accused person very onerous and may cause his acquittal. The criminal law in Nigeria seem to have ignored the fact that such sexual offences are usually committed in secret and hidden places away from the public glare thus eliminating even the least possibility or likelihood of any corroborative evidence. In addition, the likelihood of having an adult witness(es) to such sexual offences is remote because such crime will most likely not be committed before non-participating adult conspirators.

In the light of the foregoing, this thesis therefore contends that the Nigerian Criminal jurisprudence on rape is weak and fraught with loopholes. The sexual offences listed in the two Criminal Codes of Nigeria (the Penal Code applicable in Northern Nigeria and the Criminal Code applicable in Southern Nigeria) include rape, indecent assault, abduction and sexual offences against the order of nature (sodomy and bestiality). However, common acts of sexual indignity and misconduct like stalking, voyeurism, domestic violence with sexual colorations, disrobing, spousal rape, and sexual harassment (at home and at the workplace) which are grievous criminal offences in India,³¹ were offences unknown to Nigeria's criminal jurisprudence, even though the opinion has been expressed that "sexual harassment is a common feature in Nigerian society particularly in offices where some men in positions to hire labour exploit women's desperation for jobs and demand sexual gratifications ahead of job offers."³² There is therefore an urgent need for legislative review and judicial activism with regards to the Nigerian criminal jurisprudence on rape and sexual offences.

Interestingly, on 3 June, 2015 (two days to the end of its four year life) the Nigerian Senate suspended its own Rules and hurriedly passed 46 Bills into Law in 10 minutes!

³¹ See India's Criminal Law (Amendment) Act, 2013.

³² Ozo-Eson, P. I. (2008). "Law, Women and Health in Nigeria." *Journal of International Women's Studies* 9(3), p.295.

These Bills have been pending since the four year tenure of the Senate.³³ One of such Bills is the Sexual Offences Bill (SB. 279) which prescribed life imprisonment for rapists and those who have sexual offences intercourse with children below 11 years of age. The Bill also criminalizes child sex tourism and the deliberate infecting of others with HIV/AIDS or other diseases, and prescribes 10 years imprisonment for incest and child pornography.³⁴

Additionally, it included various sentences and fines for other sexual offenses such as sexual harassment, prostitution of mentally disabled persons and lacing drinks with drugs with intent to sexually abuse. It also mandated storing names of sex offenders in a database and further provides a witness protection program to safeguard victims and witnesses on trial for sexual crimes.³⁵ The bitter irony of the Bill is that by criminalizing ‘sexual intercourse with children below 11 years,’ it means that the Act has pegged minimum the legal age of sexual intercourse in Nigeria 11 years. By this provision, the Bill is arguably defining a child to mean a person less than 11 years of age. Consequently, the new Bill has placed itself at variance with both the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the Child Rights Act, 2003 all of which define a child as a person below 18 years of age. However, it is yet to be seen what will be the ultimate fate of the Bill will be since it has not been passed by the Federal House of Representatives or signed into law by President of Nigeria.

4.2.3 National Legislation on Domestic Violence

Till date, there is no national legislation against domestic violence in Nigeria. There is also no legislation against intimate partner violence (IPV) in Nigeria, even though

³³ The Guardian Newspaper Online, 4 June 2015. <http://www.nguardiannews.com/2015/06/senate-dumps-own-rules-passes-46-bills-in-10-mins/> (5/6/2015).

³⁴ The Guardian Newspaper Online, 4 June 2015, *ibid*.

³⁵ <http://www.ibtimes.com/nigerian-senate-approves-life-imprisonment-child-rapists-1953232> (5/6/2015).

Intimate Partner Violence (IPV) is considered a terrible form of domestic violence which leads to other violations of a woman's human rights and dignity.³⁶ It violates the right to live with human dignity and identity as well as a denial of the universal right to equality.³⁷ Therefore, the inability of the Nigerian state to recognize and criminalize most offences related to gender-specific domestic violence and intimate partner violence against women is a further threat to the right to dignity and equal protection of women guaranteed in international law, and therefore a fundamental *lacuna* in its legislative framework.

It must however be mentioned that some states in Nigeria have certain laws prohibiting and criminalizing various forms of women-specific violations.³⁸ Ozo-Eson³⁹ contends also that the Nigerian police usually consider and dismiss wife battering as a "family matter" which does not call for legal justice or police intervention, and that consequently, domestic violence and other violent behaviour against women do not attract the attention of the society let alone enacting laws against them,⁴⁰ albeit spousal abuse has been identified as the most degrading and devastating form of domestic violence which breaches a woman's right to dignity. And according to Amnesty International, spousal abuse is borderless and usually perpetuated against every class of

³⁶ Ambily, P. (2014). Evaluating the Criminal Justice Interventions for 'Intimate Partner Violence' in India: The Need for a Paradigm Shift. *SPCERA International Journal of Law and Governance*, (SPCERA IJLG), 3(6), 32-42. doi: <http://spcera.in/pdf/4Amly-Criminal%20-justice%20and%20interventions-%20Ambily.pdf>

³⁷ Ambily, P. (2014), *ibid*

³⁸ Some of these state legislations include: (a) Law to Prohibit Female Circumcision and Genital Mutilation, Edo State 1999; (b) A Law to Amend some of the Provisions of the Criminal Code Law Cap. 48 Laws of Bendel State 1976 as applicable to Edo state, 2000; (c) A Law to Prohibit Girl Child Marriages and Female Circumcision or Genital Mutilation in Cross River State, 2000; (d) The Female Genital Mutilation (Prohibition) Law, Bayelsa State, 2000; (e) A Law to make it unlawful to infringe the Fundamental Rights of Widows and Widowers, and for other Related Matters, Enugu State 2001; (f) A Law for the Monitoring of Maternal Mortality in Edo State and other Matters Connected Thereto, 2001; (g) Rivers State Reproductive Health Service Law, No. 3 of 2003; (h) Rivers state Schools Rights (Parents, Children and Teachers) Law No. 2, 2005; (i) Women's Reproductive Rights, Anambra State, 2005; (j) Age of Customary Marriage Law, 1956; (k) Limitation of Dowry Law Chapter L 15, 1956; (l) Children and Young Persons Law, 1958; (m) A Law to Provide Protection Against Domestic Violence and For Connected Purposes (Lagos State) 2012.; (n) Ekiti State Gender-Based Violence (Prohibition) Law, 2011; (o) Imo State Free, Compulsory Qualitative Education Law 2011.- See p. 24-25, http://www.ng.undp.org/content/dam/nigeria/docs/IclusiveGrwth/UNDP_NG_inclusiveGrwth_Gender-Briefing-Kit230513.pdf (13/5/2015).

³⁹ Ozo-Eson, P. I. (2008). "Law, Women and Health in Nigeria." *Journal of International Women's Studies* 9(3), p.295

⁴⁰ *Ibid* at 292

women: literate and illiterate, rich and poor, able bodied and even the physically challenged.⁴¹

This researcher therefore contends further that the absence of relevant legislation against domestic violence in Nigeria poses a consequential threat to the globalization and sustainable protection of women's right to dignity in the country.

4.2.4 National Gender Policy, 2006

The Nigerian National Gender Policy, NGP 2006 was articulated by the Federal Ministry of Women Affairs. It is the outcome of an extensive research and consultative process whose objectives, goal, targets and strategies were adopted by the consensus of partners and stakeholders at several zonal and national workshops.

It replicates the international template for monitoring, measuring and ensuring that both women and men benefit from basic socio-economic programmes necessary to eliminate discrimination and guarantee equality. It replaced and filled the gaps in the National Policy on Women 2000 (existing at the time) which later came into effect in 2001.

The goal of the National Gender Policy is to “build a just society devoid of discrimination, harness the full potentials of all social groups regardless of sex or circumstance, promote the enjoyment of fundamental human rights and protect the health, social, economic and political wellbeing of all citizens in order to achieve equitable rapid economic growth; evolve an evidence-based planning and governance system where human, social, financial and technological resources are efficiently and effectively deployed for sustainable development.”⁴² Nigeria's National Gender Policy (NGP) reiterates that equality and empowerment of women is a *sine qua non* for the

⁴¹ Amnesty International, 2005. See also Ozo-Eson, P. I. (2008) *ibid* at 293.

⁴² The UN Gender Theme Group, Nigeria (2013). Gender Equality Briefing Kit. Nigeria: The United Nations System in Nigeria, p. 27. http://www.ng.undp.org/content/dam/nigeria/docs/IclusiveGrwth/UNDP_NG_inclusiveGrwth_Gender-Briefing-Kit230513.pdf (14/5/2015).

actualization of the UN Millennium Development Goals (MDGs) No. 3. Kunle Sehinde⁴³ considers the actualization of Millennium Development Goal no. 3 (Gender equality and the empowerment of women) as ‘the one needed to achieve all other MDGs.’

Uche Okonkwo⁴⁴ even suggested that the NGP should be enshrined in the 1999 Nigerian Constitution, following the examples of Zimbabwe, Kenya, and especially Rwanda where, additionally, the National Women Council has been constitutionalized in Article 187 of the 2003 Constitution.⁴⁵ He rightly suggested the constitutionalization of the NGP as well as the introduction of gender studies as a core school subject in secondary and higher institutions in Nigeria.⁴⁶ The paper however did not make reference to India or South Africa nor was it particular on women’s right to dignity.

The NGP is the core domestic policy instrument for realizing Nigeria’s commitments to national, regional and international policy and treaty instruments, including CEDAW, the African Union Protocol to the Rights of Women in Africa, and the DEVAW, for the promotion and protection of women’s human rights including their right to dignity, as well as sexual independence at home, in private, public and or open space.

It has also been reported that the NGP aims to “reduce gender bias that arises from traditional cultural customs” by focusing on empowerment and basic education for women and “the abolishment of traditional practices which are harmful to women.”⁴⁷ And with regards to female health, the NGP seeks to tackle Female Genital Mutilation (FGM), Vesico-vaginal fistula (VVF) and violence against women (VAW).⁴⁸

⁴³ Sehinde, B. K. (2013). An Overview of Legal and Implementation Framework of Nigeria’s National Gender Policy. In R. I. Ako-Nai (Ed.), *Gender and Power Relations in Nigeria* (pp. 87-100). Plymouth, UK: Lexington Books, at 89.

⁴⁴ Okonkwo, U. U. (2013). Gender Question and National Policy in Nigeria: Historical Analysis. *Kaduna Journal of Sociology (KJS)*, 1(1), 278-287.

⁴⁵ *Ibid* at p.283.

⁴⁶ *Ibid* at pp.284-286.

⁴⁷ See Japan International Cooperation Agency (JICA) Public Policy Department, (March 2011). Country Gender Profile Nigeria: Final Report (pp. 10-13), especially the Summary at pp. iv-v. http://www.jica.go.jp/english/our_work/thematic_issues/gender/background/pdf/e10nig.pdf (14/5/2015).

⁴⁸ *Ibid* at p. v. The report also described VVF as “an abnormal fistulous tract extending between the bladder and the vagina that allows the continuous involuntary discharge of urine into the vaginal vault. The cause is inadequate care on giving birth without

It is therefore beyond argument that the laudable contents and focus of the NGP are premised on Nigeria's quest for social justice (Chapter II of the 1999 Nigerian Constitution), popular and inclusive democracy (CEDAW and the African Union Protocol on the Rights of Women in Africa) as well as participatory and sustainable development (MDGs), for every Nigerian, irrespective of sex or circumstance.

Overall, the NGP seeks to equip stakeholders with strategic skills for achieving standard levels of social, cultural and fiscal change for the empowerment and inclusion of all citizens, even though a recent study shows that relevant public agencies mandated to document information and data on gender statistics in Nigeria "lack basic technical competencies and show very little commitment to the engendering process."⁴⁹

The researcher agrees with the optimism expressed by Durojaye, Okeke and Adebajo⁵⁰ that if fully implemented, the NGP is elaborate and protective enough on women's rights and therefore capable of delivering sufficient equality in rights, dignity and non-discrimination including the elimination of three major harmful cultural practices against women namely, son preference, primogeniture and burial/widowhood rites.

The daunting challenge however, is not the content of the policy document but the impossibility of its implementation as a proper legislation due to the non-domestication of the CEDAW upon which the NGP rests. It is for this reason that Oby Nwankwo, Nigeria's representative to the CEDAW Committee, lamented that Nigeria is notorious for violating international agreements.⁵¹

medical access, or receiving violence. WHO says that in the Sub Sahara Africa, Middle East and Asia, 2 million or more suffer VVF all over the world (NPO Japan VVF website) <http://blog.fistula-japan.org/> (14/5/2015).

⁴⁹ Omoluabi, E., Aina, O. I., & Attanasso, M. O. (2014). Gender in Nigeria's development discourse: relevance of gender statistics. *African Population Studies*, 27(2s), 372-385.

⁵⁰ Durojaye, E., Okeke, B., & Adebajo, A. (2014). Harmful cultural practices and gender equality in Nigeria. *Gender and Behaviour*, 12(1), 6169-6181.

⁵¹ Nwankwo Oby, "Nigeria is notorious for abandoning international treaties" Nigeria Vanguard Newspaper, 22 September, 2013 (Interview with Josephine Igbinovia) <http://www.vanguardngr.com/2013/09/nigeria-is-notorious-for-abandoning-international-treaties-oby-nwankwo/> (28/3/2015).

On this note, the researcher joins the call on the Nigerian National Assembly to domesticate the CEDAW into the Laws of the Federal Republic of Nigeria. This will weigh on the executive to take steps towards its implementation or risk litigation for non-compliance.

4.2.5 The Child Rights Act, 2003⁵²

In consequence of the mandates in the UN Convention on the Rights of the Child and the AU Charter on the Rights and Welfare of the Child, the Nigerian National Assembly promulgated the Child Rights Act, 2003.⁵³

The Act replicates allied international and regional instruments which recognize children as human beings and as subject of their own rights aside other general rights which apply to adults, some of which also cover children.⁵⁴

The Act is arranged in 24 parts, 278 sections and eleven schedules. It also repeals the Children and Young Persons Act and consolidates all previous laws relating to children into one. It spells out the rights and responsibilities of children in Nigerian and protects their rights against all forms of exploitation, abuse and violation.⁵⁵

Each part of the Act embodies issues specific to the child's welfare, best interest and the administration of juvenile justice. These include the core essence of best interests of the child;⁵⁶ the protection of the basic rights of a child and other protections;⁵⁷ the care and

⁵² This Act is being examined in specific relation to the legislative framework for the protection of the right to dignity of the girl-child as a "woman".

⁵³ The Child Rights Bill was passed into law by the National assembly in July 2003 and was signed into law in September 2003 by the then President Olusegun Obasanjo.

⁵⁴ Arinze-Umobi, C., & Iguh, A. (2011). Child's Sexual abuse: The Role of International Instrument in Nigeria. *Benue State University Journal of Private and Public Law, BSUJPPL*, 1(1), 71-79. Two major child-specific international and regional human rights instruments apply for the protection, development, survival and inclusive participation of children in Nigeria. These are the Convention on the Rights of the Child (CRC), adopted by the General Assembly of the United Nations in November 1989 (and ratified by Nigeria in 1991) and the African Union Charter on the Rights and Welfare of the Child, adopted by the AU Assembly of Heads of State and Government in July 1990 (and ratified by Nigeria in 2000). The Convention on the Rights of the Child outlines the human rights to be respected and protected for every child below 18 years old and enjoins states to ensure the implementation of the rights recognized in the Convention by taking necessary legislative, administrative and other measures.

⁵⁵ Dankadai, L. B. (2015). An Appraisal of Children's Right and Child Domestic Servants Under Child Rights Act 2003. *Advances in Social Sciences Research Journal*, 2(3), 261-270, at 265.

⁵⁶ Part I.

protection of children in need;⁵⁸ rules for the supervision and care of children;⁵⁹ tests to determine a child's paternity or maternity;⁶⁰ custody and possession of children;⁶¹ as well as wardship, guardianship, adoption and fostering of children;⁶²

Part XIII creates a family court while Part XIV provides for day-care and child-minding for infant child. The Act also provides for community and voluntary homes and government support for the child⁶³ and with respect to the administration of child justice and allied institutions.⁶⁴

Section 11 of the Act provides elaborate protection of the child's right to dignity thus:

Every child is entitled to respect for the dignity of his person, and accordingly, no child shall be; subjected to physical, mental or emotional injury, abuse, neglect or maltreatment or punishment, including sexual abuse; subjected to torture, inhuman or degrading treatment or punishment, subjected to attacks upon his honour or reputation; or held in slavery or servitude, while in the care of parent, legal guardian or school authority or any other person or authority having the care of the child.

The Act is a significant statutory framework which invariably secures the right to sexual dignity and life of the girl-child. For instance, bearing in mind that the offence of rape can be committed by men only in Nigeria, Section 31 of the Child Rights Act criminalizes any sexual intercourse with a child below 18 years and make it punishable with imprisonment for life, even if the child consented thereto or the accused sincerely thought the child to be older than 18 years.⁶⁵ Section 32(1) and 33(2) makes it an offence punishable with 14 years imprisonment to sexually abuse or exploit a child in

⁵⁷ Parts III and IV.

⁵⁸ Part V.

⁵⁹ Part VI.

⁶⁰ Part VII.

⁶¹ Part VIII.

⁶² Parts IX to XII.

⁶³ Parts XV to XIX.

⁶⁴ Part XX. Other miscellaneous provisions are contained in Part XXIV.

⁶⁵ Section 31(3) of the Child Rights Act

any other manner not specified in the Act. It is therefore necessary for stake holders in the administration of justice in Nigeria to show decisiveness in the implementation of the Act.

Regrettably, a recent poll reveals that in most rural schools and rural communities in Nigeria, “up to 85% of both children and adults respectively do not know that there is a law protecting the rights of the child in Nigeria.”⁶⁶

4.2.6 Critique of the Nigerian Legislative and Policy Framework

The fundamental gaps in the legislative and policy framework for the protection of women’s right to dignity in Nigeria are elaborated in chapter 5, particularly [5.3] of this thesis.

However, it is imperative to emphasise that the absence of a national legislation on domestic violence in Nigeria, as well as the inability to implement the NGP arising primarily from the non-domestication of the CEDAW and the Women Protocol to the African Charter leave pressing gaps in the law and policy mechanism for the protection of women’s dignity and women’s rights generally in Nigeria. Ditto the narrow definition of rape, the non-criminalization of spousal rape and wife beating in the Nigerian criminal jurisprudence, as well as the “patriarchal” provision in Section 179(5) of the Nigerian Evidence Act that “A person shall not be convicted of the offences mentioned in paragraph B of the subsection 1 of Section 51 or 218, 221, 223, or 224 of the Criminal Code upon the uncorroborated testimony of one witness.”⁶⁷

It is also a legislative set back that 12 years after the promulgation of the Child Rights Act, 2003, only 16 out of Nigeria’s 36 states have domesticated the Act (bearing in mind that child rights protection are on the residual list of the 1999 Nigerian

⁶⁶ Arinze-Umobi, C., & Iguh, A. (2011). Child's Sexual abuse: The Role of International Instrument in Nigeria, op. cit at 79.

⁶⁷ The offences referred to in those sections include rape and other sexual offences.

Constitution which means that under the federal structure of Nigeria, individual states have exclusive jurisdiction to make laws relevant to their own circumstances.⁶⁸ This researcher however agrees with Akinwumi that “the rights of the child can no longer be negotiated away in the name of culture or political interest if the condition of the Nigerian child is to change.”⁶⁹ This thesis also shares the earlier view of Donnelly⁷⁰ which Akinwumi⁷¹ also subscribed to, that it is impossible to protect legal rights without a special force established to justify all to such rights, that is to say, there is need for a special police unit (not just a department within the police force) for the enforcement of child rights in Nigeria.

The provision in the Fundamental Rights (Enforcement Procedure) Rules, 2009 which seek to expand *locus standi* and introduce public interest litigation in the enforcement of fundamental rights in Nigeria is merely “pretentious” because it is contained in the “Preamble” only rather than as a “Rule” or “Order”. Both old and recent scholarships are united on the legal implication of “Preamble” in a legislation or Constitution. According to Abiola Sanni, “the nature of a preamble does not give assurance that the contents have much legal weight.”⁷² And in the old American case of *Jacobson v Massachusetts*⁷³ the court emphasised that the Preamble does not have any legal force, even in the Constitution because it merely introduces the document as a whole and does not, in and of itself, permit the exercise of any legal power whatsoever, and that any power exercisable under the Constitution must emanate from another part of the Constitution but definitely not the preamble.

⁶⁸ The 16 states which have domesticated the Child Rights Act are Abia, Anambra, Bayelsa, Ebonyi, Edo, Ekiti, Imo, Jigawa, Kwara, Lagos, Nassarawa, Ogun, Ondo, Plateau, Rivers and Taraba, even though in most parts of Nigeria there is still very little information on the Child Rights Act (See Arinze-Umobi, C., & Iguh, A. (2011). Child's Sexual abuse: The Role of International Instrument in Nigeria, *op.cit.* at 77-79). The researcher humbly observes that it seems most of the core states in the predominantly Moslem Northern Nigeria are reluctant to promulgate the Act into state law because the Act defines a child as a person below 18 years while child marriage is permissible in their own jurisdictions.

⁶⁹ Akinwumi, O. S. (2010). Legal impediments on the practical implementation of the Child Right Act 2003. *International Journal of Legal Information*, 37(3), 10, at p.362.

⁷⁰ Jack Donnelly: 1989, *Universal Human Rights in Theory and in Practice*, Ithaca and London; Cornell University Press, p.9.

⁷¹ Akinwumi, O. S. (2010), *ibid* at 362.

⁷² See Abiola Sanni “Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for Far-reaching Reform,” 11 *Afr. Hum. Rts. L.J.* 511 2011, p.524

⁷³ 197 US 11 (1905), cited in Abiola Sanni, *op. cit.*

Furthermore, for purpose of filing an application for the enforcement of fundamental rights, the 2009 Rules define a “court” in Order 1 Rule 2 to mean “the Federal High Court or the High Court of a State or the High Court of the Federal Capital territory, Abuja is inconsistent with the clear provisions of Section 46(1) of the 1999 Nigerian Constitution which prescribes that an application be made to “a High Court in that State”. Therefore, being a subsidiary legislation, the 2009 Rules cannot override or amend the Constitution but shall rather be considered void to the extent of its inconsistency with the Constitution.⁷⁴ It is therefore a significant *lacuna* that in spite of its “good intention” the Fundamental Rights (Enforcement Procedure) Rules 2009 cannot even be deemed to be a “proper law” unless and until the National Assembly amends the said Section 46(1).⁷⁵

This researcher humbly holds the view that it must have been in the urgent good desire to change the old order and expand the access jurisprudence for the enforcement of fundamental rights in Nigeria that the Chief Justice of Nigeria “mistakenly” overshot the clear provisions of Section 46(3) of the Constitution to wit: “The Chief Justice of Nigeria may make rules with respect to the practice and procedure of **a High Court** for the purpose of this Section.”⁷⁶

Suggestions have also been made for the setting up of service projects in all Nigerian states to disseminate information and sensitize rural dwellers on the relevant provisions and protections in the Child Rights Act. Human rights NGOs, the media and civil society groups should also mount pressure on the executive and legislature in the various states where the Child Rights Law has not been domesticated to do so, because after all, there is nothing wrong with the provisions of the Child Rights Act.⁷⁷

Recently, the 7th Nigerian Senate passed the Sexual Offences Bill, 2015 which makes

⁷⁴ Section 1(3) of the 1999 Nigerian Constitution.

⁷⁵ Aligba, A. (2011). Fundamental Rights (Enforcement Procedure) Rules 2009: An Appraisal. *Benue State University Journal of Private and Public Law, BSUJPPL*, 1(1), 61-70, at 70.

⁷⁶ Highlight and underline are for emphasis.

⁷⁷ Aligba, A. (2011), *Ibid* at 79.

sexual intercourse unlawful if the victim is below 11 years old. This is very embarrassing because it deviates from the definition of a child in international, regional and other municipal human rights instruments as a person below 18 years of age.

4.2.6.1 The Way Forward

The current Nigerian legislative and policy framework for the protection of the right to dignity of women, especially against domestic violence and sexual violations is fraught with several defects which leave legislative gaps begging to be bridged.

The way forward for bridging these gaps and reforming the Nigerian legislative and policy framework for the protection of the right to dignity of women are elaborated in Chapter 6 of this thesis, (particularly 6.4.2: Recommendations For Law And Policy Reform In Nigeria). The researcher therefore considers it unnecessary to discuss them here.

However, it must be stated too that in addition to other recommendations, the existing jurisprudence on rape in Nigeria needs also to be amended to provide *inter alia*, that a woman living separately from her husband under a decree of judicial separation or a decree *nisi* not made absolute; or who has obtained an injunction restraining her husband from having sexual intercourse with her, shall be deemed not to be his wife for the purposes of this section. Similarly, a Muslim woman living separately from her husband during the period of ‘*iddah*’, shall be deemed not to be his wife for the purposes of this lawful sexual intercourse.

The justification for such amendment is to assert that marital rape means any unconsented or unwanted intercourse or penetration (vaginal, anal or oral) obtained by force, threat of force, or when the wife is unable to consent. On this note, this researcher

disagrees with the contention of A. O. Yusuf,⁷⁸ that marriage creates between the couple permanent advance consent and irrevocable access to their bodies with respect to sex.

More so, by the removal of the exception, the current protection that is given to men who rape their wives will thereby be removed, and they can be made equally liable to be charged with rape. This will also go a long way in checking the growing menace of domestic violence against women in Nigeria and elsewhere.⁷⁹ This proposition is based on the premise that sex must be a cooperative act of free will and there is no reason why the same premise should not be applicable to parties who are married to each other, irrespective of a possible argument which may arise, especially among Muslims that criminalising marital rape would be against the Islamic principle under which a Muslim wife is required to submit to her husband's request for sexual relations.⁸⁰

With particular regards to the Child Rights Act 2003, this thesis suggests *inter alia*, that urgent steps be taken to initiate, facilitate and promote public enlightenment and sensitization on the provisions of the Child Rights Act 2003 especially on the prohibition and penal consequences of child labour so as to deter and discourage parents and guardians who perpetuate this form of indignity on their house-maids.

4.3 Legislative and Policy Framework: INDIA

In addition to constitutional guarantees and a fearless and innovative judiciary, India also has a pro-active legislature and remarkable women-sensitive legislation which meet the minimum requirements of international law for the protection of women's dignity

⁷⁸ *Gender Inequality and selective victimization under the Nigerian Law of Rape*, Ahmadu Bello University, Zaria Journal of Private and Comparative Law (JCPL) Vol. 2 & 3, 2007-2009 p.101; Reference has always been made to the words of Sir Matthew Hale in the History of the Pleas of the Crown, vol. 1, p. 629 to the effect that "...the husband cannot be guilty of rape committed by himself against his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."

⁷⁹ For instance, by the September 2007 amendment to the Penal Code of Malaysia, marital rape has been criminalized. By making it illegal for a man to cause 'fear or death or hurt to his wife...to have sexual intercourse'.

⁸⁰ Reports abound of many battered women who have said that their husbands demanded sex directly following a beating, regardless of the wife's wishes or emotional or physical state. When a woman consents to sex out of fear or coercion, it is rape, and the perpetrator should not be allowed to get away with the offence by the mere fact that he is married to the survivor; see Center for Research on Partner Violence www.wellesley.edu.

and freedoms generally. These prominent legislative advances, particularly on baby sex-selection, dowry, dignity and sexual violations are considered hereunder.

4.3.1 Protection of Human Rights Act, 1993 [as amended by the Protection of Human Rights (Amendment) Act, No. 43 of 2006]: The National Human Rights Commission, State Human Rights Commission and the Human Rights Courts

The United Nations first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris in 1991 formulated what became known as *The Paris Principles*.⁸¹ These principles relate to the status and functioning of national institutions for the protection and promotion of human rights and it enjoins UN member States to establish national human rights institutions for the promotion and protection of human (and women's) rights.

The Paris Principles which have been applauded as “*the foundation and reference point for the establishment and operation of national human rights institutions*,”⁸² provides that a national institution for the promotion and protection of human rights shall be vested with competence, broad mandate, independence and constitutional powers to perform its functions.

In line with the Paris Principles and in addition to the existing constitutional powers of the Supreme Court and High Courts on fundamental rights under Articles 32 and 226 respectively, the Indian Government also established the National Human Rights Commission of India [hereinafter referred to as the Commission] under the Protection

⁸¹ Adopted as Resolution 1992/54 of 1992 by the United Nations Human Rights Commission and later by the United Nations General Assembly Resolution 48/134 of 1993.

⁸² Asia Pacific Forum, http://www.asiapacificforum.net/about/paris_principles.html. (25/10/2013).

of Human Rights Act, 1993. India thus became the first South Asian country and among the first few countries to establish the Commission.⁸³

It has been said that the establishment of the Commission as an autonomous body is a clear indication of India's commitment towards the effective implementation and protection of human rights as prescribed under national and international instruments.⁸⁴

The Protection of Human Rights Act, 1993 has eight chapters and 43 Articles. Section 2 (d) of the Act defines human rights as "rights relating to life, equality and dignity of the individual guaranteed by the Constitution or embodied in international covenants and enforceable by Courts in India." This definition is broad enough and the specific mention of the most pressing rights of women, namely, life, equality and dignity is indicative of India's positive stride towards the protection of women's right to dignity and freedom from exploitation.

Chapters 2 and 4 of the 1993 Act (as amended by the Protection of Human Rights (Amendment) Act 2006, No.43 of 2006) established the National Human Rights Commission and State Human Rights Commission respectively and spell out their functions in Section 12 to include the following:

1. Initiate or hear a private or public interest petition based on the allegation of violation of human rights or abetment thereof or negligence by a public officer to prevent such violation, as well as intervening in any matter for the enforcement of human rights pending before any court with the approval of such court.

⁸³ According to Manoj Kumar Sinha, Manoj Kumar Sinha, "Role of the National Human Rights Commission of India in Protection of Human Rights" <http://www.rwi.lu.se/pdf/seminar/manoj05.pdf> (25/10/2013), "The Human Rights Commission of Sri Lanka was established under the Human Rights Commission of Sri Lanka Act, No. 21 (1996) and became operational in September 1997. The National Human Rights Commission (NHRC) of Nepal is an independent and autonomous statutory body established in the year 2000 under the Human Rights Commission Act 1997."

⁸⁴ Manoj Kumar Sinha, "Role of the National Human Rights Commission of India in Protection of Human Rights" <http://www.rwi.lu.se/pdf/seminar/manoj05.pdf> (25/10/2013).

2. Visit, examine and make recommendations on the living conditions of inmates at any jail or government facility for the detention, housing, treatment, reformation or protection of inmates.
3. Study and review existing safeguards provided by or under the Constitution or any other law, treaty or international instrument for the protection of human rights and recommend measures for their effective implementation.
4. Undertake and promote research on the study and promotion of human rights through mass literacy, public enlightenment, the media etc. and to support and encourage human rights NGOs and like institutions.
5. Review the factors, including acts of terrorism which inhibit sustainable enjoyment of human rights and recommend appropriate remedies for the promotion and protection of human rights.

Interestingly, the Commission's mandate covers causes related to women and children, atrocities on Dalits/Members of minority community, the disabled and bonded labour.⁸⁵ Article 10 (c) of the Act empowers the Commission to adopt and *regulate its own procedure* thereby guaranteeing its independence and effectively insulating it from common procedural hiccups or technicalities which may hinder effective human rights delivery. To avoid inflow of abusive and vexatious complaints, the Procedural Regulation 8 of the Commission further empowers it to refuse certain category of complaints especially if they relate to events which occurred more than one year prior to lodging the complaint or matters which are *sub judice* (unless the court approves), vague, apparently frivolous, anonymous or based on pseudonymous identities and/or subjects as well as those which fall outside the mandate of the Commission.

⁸⁵ <http://www.nhrc.in>, cited in Manoj Kumar Sinha, "Role of the National Human Rights Commission of India in Protection of Human Rights" op. cit.

Section 30 of the Act establishes the Human Rights Courts *for the purpose of providing speedy trial of offences arising out of violation of human rights* in the various states where no special courts exist for this purpose.⁸⁶

Its Section 31 empowers the various State Governments to nominate a Public Prosecutor or appoint an advocate (with at least seven years of practical experience) who shall act as a Special Public Prosecutor to conduct cases in the Human Rights Court.

It is humbly submitted that the diligent compliance with the Paris Principles further confirms India's commitment for providing sustainable legal framework to protect women's dignity and human rights generally, a step which other developing countries may want to follow.

4.3.2 Protection of Women from Domestic Violence Act, 2005.

The Protection of Women from Domestic Violence Act, 2005 [also known as Domestic Violence Act] came into force in India on 26 October 2006. The Act takes a sweep at domestic violence generally and offers protection to a wife or female co-habiting partner against violence from her husband or male partner or their relatives. The Act also covers mothers, widows as well as biological and adopted sisters.

The Act defines "domestic violence" to include the *unlawful demand for any dowry or other property or valuable security as consideration for marriage*. It thus incorporates and replicates the earlier provisions of Section 498A IPC which criminalizes the demand or payment of dowry as consideration for marriage.⁸⁷ This protects women and girls against the exploitative culture of "*chattelization*" of marriage and invariably secures their right to life and dignity.

⁸⁶ See the Proviso in Section 30 (a) and (b) of the Act.

⁸⁷ Under Section 2 (h) of the Act, "'dowry' shall have the same meaning as assigned to it in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961)."

Section 3 of the Act prohibits and criminalizes every domestic violence including those act, omission or commission of a respondent (husband, live-in lover, partner or other family member of the aggrieved woman/female victim) which harms, injures or endangers her mental or physical well-being, or tends to cause her any physical abuse⁸⁸, sexual abuse⁸⁹, verbal and emotional abuse,⁹⁰ economic abuse,⁹¹ or with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security including threat of any such or similar abuse.

The Act rightly contemplates that domestic violence may be perpetrated in or out of marriage and by persons (whether male or female) other than a husband, for instance, his relatives. And to guarantee complete protection to the aggrieved women, it empowers her to sue any such relative as ‘respondent’.⁹² Thus, in *Kalpana W/o Santosh Jadhav v. Hanma & Ors*,⁹³ the petitioner filed an action against eight respondents (six were women, including her sister in-laws and in-laws) for harassment under Section 12 of the Protection of Women from Domestic Violence Act, 2005. The Sessions Court rejected her suit and dropped charges against the six women on the ground contended by them *inter alia*, that being women, they fell outside the definition of ‘respondent’ in the Act, and therefore proceedings against them were incompetent.

⁸⁸ The Section define *physical abuse* as any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force.

⁸⁹ The Section defines *sexual abuse* to include any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman.

⁹⁰ The Section defines *verbal and emotional abuse* to include insults, ridicule, humiliation, name calling and insults or ridicule especially with regard to not having a child or a male child, and repeated threats to cause physical pain to any person in whom the woman is interested.

⁹¹ The Section defines *economic abuse* as including deprivation of all or any economic or financial resources to which the woman is entitled under any law or custom whether payable under an order of a court or otherwise or which she requires out of necessity including, but not limited to, household necessities for her and her children, if any, as well as *stridhan* and other valuable securities or rent/payments arising from both movable and immovable property, jointly or separately owned by her or her children. [*Stridhan* generally refers to “what a woman can claim as her own property within a marital household. It may include her jewelry (gifted either by her family), gifts presented to her during the wedding or later, and the dowry articles given by her family.”] See http://en.wikipedia.org/wiki/Dowry_law_in_India#Stridhan 12/11/2013.

⁹² Section 2 (q) of the Act defines “respondent” to mean “any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner.”

⁹³ 2013 Indlaw MUM 908; Criminal W.P. No. 63 of 2013, delivered on 27 September, 2013.

On appeal, the Bombay High Court upheld the appeal, set aside the decision and held that "the view taken by the Sessions Judge that women will not be covered by the definition of the term 'respondent' as given in the Domestic Violence Act, is clearly contrary to law." He also cited *Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade & Ors*,⁹⁴ where the Supreme Court had specifically addressed the issue.

The Act also protects the reproductive rights, sexual choices and property rights of women and against common psychological trauma and ridicule associated with childlessness or not having a male child, among others.⁹⁵

The Act has other salient characteristics namely,

1. The definition of "domestic relationship" in Section 2 (f) protects women who are or have been in a relationship with the abusing partner where both parties have lived together in the same house (*shared household*) alone or with other tenants or family members and are related by consanguinity, marriage or a relationship in the nature of marriage, or adoption.
2. It protects single women, widows, mothers and sisters, from the violence, exploitation, threat and abuse of their spouses/partners.
3. The definition of "physical abuse" in Section 3 covers such exploitative indignities as *sati sacrifice*, sexual violence, marital rape and bonded labour.
4. Section 19 empowers a court to make an Order of residence under Section 17 (1) prohibiting the violated woman from being evicted from the matrimonial home or a shared residence, even if she has no interests or title to such residence.⁹⁶

Interestingly, this order of residence is gender-specific and cannot be made

⁹⁴ 2011(3) Mh.L.J. (Cri.) 73; 2011 Indlaw SC 94.

⁹⁵ See Section 3 *op.cit.*

⁹⁶ Section 17 provides thus: "(1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law."

against a woman.⁹⁷ The police is enjoined to ensure compliance with any Order of residence⁹⁸ while shelter homes are obliged to house the violated woman if need be.

5. To protect the parties' privacy, proceedings may be heard in camera⁹⁹ and the court may also make Protection Orders restraining the abusive husband or partner from committing or aiding any further abuse, or from entering the woman's workplace or her favourite locations, or even attempting to communicate her by any physical or electronic or telegraphic manner, or issuing a threat to any of her relatives or friends.¹⁰⁰ The breach of a protection Order is a non-bailable offence punishable with up to one year imprisonment, a fine or both¹⁰¹ and the accused may be convicted upon the singular testimony of the aggrieved person.¹⁰²
6. Provision is also made under the draft Act for the appointment of Protection Officers and NGOs or similar bodies to assist abused women with legal aid, Medicare, safe shelter and if such Protection Officers fail to discharge these duties they may be jailed for one year, a fine or both.¹⁰³
7. Above all, a petition under the Act may even be for violations which took place before the commencement of the Act, even if the parties no longer live together.

This was the conclusion of the Indian Supreme Court in *V.D. Bhanot v. Savita Bhanot*,¹⁰⁴ after considering the constitutional protections in Article 21 of the Constitution *vis-à-vis* the provisions of Sections 31 and 33 of the Domestic Violence

⁹⁷ See Proviso to Section 19 (1) (b).

⁹⁸ Section 19 (5).

⁹⁹ Section 16 provides thus: "Proceedings to be held in camera.-If the Magistrate considers that the circumstances of the case so warrant, and if either party to the proceedings so desires, he may conduct the proceedings under this Act in camera."

¹⁰⁰ Section 18

¹⁰¹ Section 32 (1)

¹⁰² Section 32 (2). And By Section 31(3), the accused may also be charged under any provision of the Indian Penal Code including Section 498A, or the Dowry Prohibition Act, 1961, as the case may be, if the facts of the case disclose the commission of an offence under any of those laws.

¹⁰³ Section 33.

¹⁰⁴ (2012) 3 SCC 183.

Act and bearing in mind that the objects of the Act is to protect the rights of women under Articles 14, 15 and 21 of the Constitution as a way of guaranteeing their dignity.

Erudite Indian female scholar Usha Kiran Rai¹⁰⁵ describes the Act as one which expansively captures the abuse of women with some degree of precision and a clear and unambiguous statement of the right of women to be free.¹⁰⁶

The authors therefore, humbly contends that presenting the Protection of Women from Domestic Violence Act, 2005 in an unambiguous language which provides undiluted protections against a wide range of violations and abuse of women shows the legislative zeal with which India seeks to strengthen the legal framework for the protection of women's dignity.

4.3.3 Criminal Law (Amendment) Act, No. 13 of 2013

Following the December 2012 gruesome gang rape and murder of a female medical student in a New Delhi bus in India, as well as the local and international outburst that ensued, the Indian Government, on 23 December 2012, set up a three member Committee headed by Justice J.S. Verma, former Chief Justice of the Supreme Court, (other members on the Committee were Justice Leila Seth, former judge of the High Court and Gopal Subramaniam, former Solicitor General of India) to recommend amendments to the Indian Criminal Law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women.

Earlier, in the case of *Sakshi v. Union of India*¹⁰⁷ the Supreme Court had decried the frequent sexual abuse of children and the inadequacies in the legislation on rape in India and had called on the legislature to review and upgrade the law.

¹⁰⁵ Usha Kiran Rai, "Protection of Women from Domestic Violence Act: A Search for New Paradigms" http://www.academia.edu/1342148/Protection_of_Women_from_Domestic_Violence_Act 12/11/2013.

¹⁰⁶ She however emphasised that Women first need to be educated in order to understand the purpose and scope of the Act and that without this, the law will achieve little. See: *Protection of Women from Domestic Violence Act: A Search for New Paradigms*, "ibid.

The Verma Committee made recommendations on laws related to rape, sexual harassment, trafficking, child sexual abuse, medical examination of victims, police, electoral and educational reforms and submitted its report on January 23, 2013. Several key recommendations of this Committee are now contained in the Criminal Law (Amendment) Act, 2013.

This anti-rape legislation was signed into law by India's President, Pranab Mukherjee, on April 2, 2013. The law amends the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872 and the Protection of Children from Sexual Offences Act, 2012.

The Criminal Law (Amendment) Act 2013 is thus considered as a drastic penal response by the Indian legislature to rising cases of sexual assault, rape, exploitation and incidental indignities and humiliation of women in India.¹⁰⁸

This Amendment Act offers enhanced protection for women's dignity by introducing new sexual offences and making fundamental changes to the definition, scope and punishment for rape and allied offences in the old legal order. These include;

1. The expression "exploitation" now includes prostitution or other forms of sexual abuse, forced labour, humiliating services, slavery and the like, or the forced removal of organs¹⁰⁹ while the act of rape is now described with specific physical terminology, even though it remains gender-specific against men.¹¹⁰

It is humbly submitted that the retention of rape as a gender-specific crime, even in international law,¹¹¹ has become legislatively faulty because after all, in the past,

¹⁰⁷ (1999) Cr LJ 5025 (SC); See also Ratanlal & Dhirajlal's *The Indian Penal Code* 33rd Edition, 2011, LexisNexis Butterworths Wadhwa Nagpur, India, p.754.

¹⁰⁸ Bhattacharyya, R. (2013). Criminal Law (Amendment) Act, 2013: Will It Ensure Women's Safety in Public Spaces?. *Journal Space and Culture, India*, 1(1), 13-26.

¹⁰⁹ Amendment Act Section 7, Penal Code Section 370 to substitute old Section 370 and 370A.

¹¹⁰ Amendment Act Section 9, Penal Code, Section 375.

¹¹¹ Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/95, UN Doc. E/CN.4/1995/42, 22

women in Ireland and England have been convicted for rape.¹¹² The definition of rape laid down in Sexual Offences Act, 2003 of England covers acts of non-consenting intentional penetration of the vagina, anus or mouth of the complainant, man or woman as the case may be.

Realistically, it is also an unequivocal act of “unlawful carnal knowledge” if a woman “forcibly penetrates” the anus of a man, or the vagina or anus of another woman with her fingers or objects other than the penis “without voluntary consent.” This may be more common during a coerced sexual intercourse between lesbians, transgender or gays, and even in prisons.

This proposition is not strange and has been acknowledged by earlier researchers as a common practice in both male and female prisons. G.J. Knowles¹¹³ citing the findings of other researchers wrote that in prison, moral or humanistic concerns have little relevance because power and status are dependent on domination and selfish gratification which often emphasise violence and exploitation and de-emphasise mutual caring and reciprocal satisfaction.¹¹⁴ Accordingly, for many inmates, eroticism is best obtained by aggression since the degree of satisfaction derived from the act of sex is often dependent on the degree of force and humiliation applied on the other partner.¹¹⁵ This use of force and humiliation is also the common with lesbian/ homosexual rapes of women in female prisons.¹¹⁶

November, 1994, para. 49. (cited in Maria Eriksson (2010): *Defining Rape: Emerging Obligations for States under International Law?*, Örebro Studies in Law 2, p. 21.

¹¹² Mary Keny, Women beware women, The Guardian, (March 19, 2001) <http://www.guardian.co.uk/world/2001/mar/19/gender.uk> (Cited in Siddharth Mehta (April 2013) “Rape Law In India: Problems in Prosecution Due to Loopholes in the Law.” Electronic copy available at: <http://ssrn.com/abstract=2250448>. (29/7/2014).

¹¹³ Gordon James Knowles, “Male Prison Rape: A Search for Causation and Prevention,” The Howard journal of Criminal Justice, Vol. 38, Issue 3, pp.267-282, Aug 1999 (Article first published online: 16 Dec 2002. Doi: 10.1111/1468-2311.00132), p.274.; <http://www.justdetention.org/pdf/knowles2.pdf> (29/7/2014).

¹¹⁴ Wooden, W.S. and Parker, J. (1982) Men Behind Bars: Sexual Exploitation in Prison, New York: Plenum Press. P.14

¹¹⁵ *ibid*

¹¹⁶ Propper, A.M. (1981) Prison Homosexuality: Myth and Reality, Lexington, MA: D C Heath, p. 143; Scacco, A.M. (Ed.) (1982) Male Rape: A Case Book of Sexual Aggressions, New York: AMS Press.

2. The general punishment for rape in India was seven years imprisonment to life and a fine. But the new law introduced special circumstances under which the minimum punishment will range from ten years to life imprisonment, namely, rape of detainees by police officers or public servants, rape by a family member,¹¹⁷ relative, teacher, guardian, or persons in position of confidence or authority; or the rape of a women below sixteen years.¹¹⁸ And if the victim dies thereby or falls into a pitiable or permanent vegetative state, capital punishment will ensue.
3. Punishment for gang rape becomes 20 years minimum to life and a fine¹¹⁹ while a new offence of “sexual harassment” is introduced as Section 354A IPC.¹²⁰
4. New offences of *voyeurism* and *stalking* were also introduced into the Indian criminal jurisprudence as Sections 354C and 354D IPC respectively.

Voyeurism is said to be committed when one “watches, or captures the image of a woman engaging in a private act¹²¹ in circumstances where such act would obviously not be possible except by an unlawful breach of her privacy. The first conviction for *Voyeurism* is imprisonment of one to three years and a fine, while a second or subsequent conviction carries a jail term of three to seven years, and a fine.

Stalking is synonymous with “Pestering” and it is said to be committed when one follows a woman and contacts, or attempts to contact her repeatedly to foster personal interaction, despite her clear indication of disinterest. This “pestering” may be a direct

¹¹⁷ This covers marital rape.

¹¹⁸ Amendment Act Section 9, Penal Code Section 376.

¹¹⁹ Amendment Act Section 9, Penal Code Section 376D.

¹²⁰ The said Section 354A IPC, defines sexual harassment as including physical contact and advances involving unwelcome and explicit sexual overtures, a demand or request for sexual favours, making sexually coloured remarks, forcibly showing pornography or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

¹²¹ *Explanation 1.*— For the purposes of this Section, “private act” includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy, and where the victim's genitals, buttocks or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the person is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2.— Where the victim consents to the capture of images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this Section.

or indirect physical, telephonic, telegraphic, internet or other electronic communication which constitutes nuisance and creates fear of violence, alarm or distress in the woman. *Stalking* carries imprisonment of one to three years and a fine, unless the accused shows that he was acting lawfully per court order, or reasonably, or to detect and prevent a crime.¹²² Public servants who knowingly disobey or neglect to record a report a violation of this amendment, or investigate it diligently may be jailed for six months to two years and a fine¹²³ while superintendents of public or private hospitals who fail or refuse to treat crime victims risk imprisonment of one year and a fine.¹²⁴

The Criminal Law (Amendment) Act, 2013 also amends the Code of Criminal Procedure, 1973 and accord women certain privileges. For instance under Section 160 (1) of the Code, any police officer investigating a crime may, by order in writing, invite any person as witness but if such intended witness is a woman, her statement will be recorded only at her residence. Similarly, by Section 46 (4), no women shall be arrested after sunset and before sunrise, except in exceptional circumstances, and even so, the arrest can only be made by a police woman and with the written permission of the Judicial Magistrate of the area. Upon notifying the woman orally of her arrest, she is presumed to have submitted thereto and a male police officer shall not touch her person to effect arrest or search.¹²⁵

A physical/medical examination after arrest shall only be conducted on her by or under the supervision of a female registered medical practitioner, and if she is below eighteen years, she shall not be detained in a police station or jail but in an Observatory Home.¹²⁶

¹²² Furthermore, a prison term of between 10 years to life imprisonment as well as a fine will now be imposed on persons convicted of trafficking a minor, and if more than one minor is involved, the sentence will be a minimum of 14 years' imprisonment, extendable to life imprisonment, and liability to a fine (Amendment Act Section 8, Penal Code Sections 370(4) & (5)); And the punishment for an acid attack that causes harm to the victim will be a minimum term of 10 years' imprisonment, extendable to a life term, while conviction for voluntarily throwing or attempting to throw acid with the intention of causing damage will incur a punishment of five to seven years imprisonment (Amendment Act Section 5, Penal Code Sections 362A & 362B).

¹²³ Amendment Act Section 3; Penal Code Section 166A.

¹²⁴ Amendment Act Section 3, Penal Code Section 166B.

¹²⁵ Section 51 (2) of the Code.

¹²⁶ Section 54 of Code of Criminal Procedure

Interestingly, any trial for rape under the Indian Penal Code, shall, as far as practicable, be presided by a female judge or magistrate.¹²⁷ The authors humbly express scepticism for this provision because of a strong likelihood of gender-bias against the male accused by a female judge which may lead to injustice, and submits instead that special panel courts of three (a presiding female judge sitting with two male judges) be established to hear such cases.

Under Section 157 of the Code, every investigation of rape, shall be conducted at the residence of the victim/survivor and, as far as practicable by a woman police officer, and if the victim/survivor is under eighteen years, she should be questioned in the presence of her guardian or parents or a social worker of the locality. If the rape victim is a child, the investigation must be carried out expeditiously within three months of the report¹²⁸ and the trial proper must be held in camera with minimal media coverage which shall not reveal the identity of the parties.¹²⁹ It is further submitted that while it is reasonable and responsible to protect the identity of a child victim of rape, such privilege ought not to avail the accused. On a second thought, this author feels that securing the identity of the accused accords with the presumption of innocence, moreover, he may not even be found guilty.

The new law also amends Section 155 (4) of the Indian Evidence Act, 1872 which provided that in a trial for rape or attempt to rape a woman, the fact that the victim was of easy virtue or immoral character diminished the weight of her evidence as was upheld by the court in the notorious case of *Tukaram v. State of Maharashtra*.¹³⁰

¹²⁷ Section 26 of the Code.

¹²⁸ Section 173 Code of Criminal Procedure of India (as amended).

¹²⁹ See Section 327 of the Code.

¹³⁰ AIR 1979 SC 185. In that case, known as the *Mathura case*, the rape victim was subjected to the equally dehumanizing 'finger-tests' (now abrogated) to determine the extent of internal injury incurred. The examining physician reported that there was no physical injury on the girl-victim, *Mathura*, but that her hymen revealed "old ruptures" and her vagina also admitted two fingers easily. The court thus trivialized her testimony because she was already used to sexual intercourse.

By the new amendment *Tukaram's Case* becomes obsolete and the dignity of a woman is now protected against sexual invasion even if she is an acknowledged prostitute or 'a woman of easy virtue.' That fact will also not reduce the weight which the court attaches to her testimony or evidence, nor will it exculpate or mitigate the charge against the accused person. Thus, in *State of Maharashtra v. Madhukar Narayan Mardikar*,¹³¹ the Supreme Court held, per Ahmadi, J. that:

Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.

All these amendments underscore advances in the legal framework for the protection and promotion of women's dignity in India, albeit this thesis agrees wholly with Gitanjali Maria's view¹³² that laws and legislation are not enough to restore what was lost in the pride and dignity of a raped or violated woman.

4.3.3.1 The Justice J.S. Verma Committee Report: Prelude to the Criminal Law (Amendment) Act, 2013

Following the gruesome rape and murder of a female medical student in India, as well as the local and international outburst that ensued, the Indian government, on 23 December 2012, set up a three member Committee headed by Justice J.S. Verma, former Chief Justice of the Supreme Court,¹³³ to recommend amendments to the Indian

¹³¹ AIR 1991 SC 207.

¹³² Gitanjali Maria, "Sexual Exploitation Against Women." Published in the newsletter *Civil Service of India*, <http://www.civilserviceindia.com/subject/Essay/sexual-exploitation-against-women.html> (28/3/13).

¹³³ Other members on the Committee were Justice Leila Seth, former judge of the High Court and Gopal Subramaniam, former Solicitor General of India.

Criminal Law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women.

The Committee submitted its report on January 23, 2013.¹³⁴ It made various recommendations for the protection of women's dignity against rape, sexual harassment, trafficking, and child sexual abuse, medical examination of victims, police, electoral and educational reforms. Other key recommendations of the Committee are summarised thus.¹³⁵

1. That a special Rape Crisis Cell should be set up to provide legal assistance to rape victims and be notified as soon as a FIR on sexual assault is made.
2. That Close Circuit Televisions be installed at the entrance and in the interrogation rooms at every police station.
3. That necessary IT facility should be provided to enable a complainant in a case of rape or sexual violation to make the complaint online.
4. That police officers should be specially trained in the handling of sexual offences while they also be duty bound to assist complainants and victims of sexual offences whether the crime was committed within or outside their ordinary service jurisdiction.

¹³⁴ Jagdish Sharan Verma, The Honourable Former Chief Justice of India, popularly described as "The face of judicial activism in the 1990s" and among the most active and respected Indian jurists, later died at a Gurgaon hospital on the night of Monday, April 22, 2013 at the age of 80. Doctors at the Medanta Medcity said he died of multiple organ failure. According to Dr Yatin Mehta, chairman of Medanta's Institute of Critical Care and Anesthesiology, the jurist "was brought to us with excessive gastro-intestinal bleeding on Friday, and we found that his liver had started failing. We admitted him in the ICU and put him on intensive supportive care. But eventually there was excessive bleeding, and his organs started failing one after the other." (Source: Indian Express Newspaper of Tuesday, 23 April 2013. <http://archive.indianexpress.com/news/justice-verma-the-face-of-judicial-activism-dies-of-multiple-organ-failure/1106404/>. (14/11/2014).

¹³⁵ Summary Report of the Committee on Amendments to Criminal Law, 2013, PRS Legislative Research, Centre for Policy Research, India, 25 January 2013. www.prsindia.org; <http://www.prsindia.org/administrator/uploads/general/1359132636~~Justice%20Verma%20Committee%20Report%20Summary.pdf> (30/10/2014).

5. That caution should be taken to ensure that public-spirited persons who offer any manner of assistance to victims of sexual offences should not be mistreated or unnecessarily roped into the crime.
6. That more people be recruited into the police and that Community Policing should be introduced and encouraged to provide adequate training to volunteers.
7. The Verma Committee also recommended a separate Bill of Rights for women in order ensure that women live a life of dignity and security as well as the right to a complete sexual autonomy including with respect to her relationships.
8. To tackle the gory incidence of dowry related violence and death of women in India, the Verma Committee recommended that all marriages celebrated in India (irrespective of the personal laws under which such marriages are solemnised) shall mandatorily be registered in the presence of a magistrate, who will ensure that the said marriage has been solemnised with the full and free consent of both partner and without any demand for dowry having been made.

4.3.3.2 Critique of the Criminal Law (Amendment) Act, 2013

The researcher identified the following shortfalls in the new anti-rape law in India.

1. The law is not internationally contemporary because it shields women only. It does not cover men, lesbians, same-sex couples and transgender from sexual assault and rape. This is without prejudice to any “innovative” interpretation which the Supreme Court may deem fit and proper for the offence of “carnal intercourse against the order of nature” in Section 377 of the Indian Penal Code.

2. The law is not intended to be a religious or moral code, yet it seems to “criminalize” sexual intercourse generally without emphasising that the core legal elements of offence of rape or sexual assault, namely, non-consensual or “coercion” and “violence”.
3. The law is silent on the criminalization of marital rape, except in cases where the couple is “separated”, and of course the separation is intended to be one ordered by a court of competent jurisdiction. It therefore does not cover a spouse who leaves the matrimonial home for any good cause, including a mistreatment by the other spouse
4. The law still insulates armed forces personnel in “disturbed areas” from prosecution for rape and sexual assault, even in the light of Article 7(1) (g) of the Rome Statute of the International Criminal Court which lists rape, sexual slavery or any other form of sexual violence of comparable gravity” in war-time as crime against humanity.¹³⁶
5. The law remains silent on parliamentarians and politicians facing rape charges keeping their remaining positions and offices until convicted, albeit the road to criminal justice may be bumpy and slow. The researcher holds the view that the reverse should have been the case, at least for sake of public decency, sensitivity and morality.

In the light of these drawbacks, the researcher hereby propose that critical initiatives be expedited with respect to educational reforms, civic education and sensitization, police and criminal justice personnel trainings and reforms, further overhaul of the criminal

¹³⁶ In relation to rape in Article 7 (1) of the Rome Statute, ‘crime against humanity’ means a rape “when committed as part of a wide spread or systematic attack directed against any civilian population, with knowledge of the attack. “

jurisprudence as well as special humanitarian centres for victim care, counselling and rehabilitation.

Finally, the researcher humbly observes that since legislative amendment is a continuum, the future is still bright for law reform in India. Thus, the fact that a forward step has been initiated with the Criminal Law (Amendment) Act, 2013 is good enough, because the prelude to any meaningful reform in a constitutional democracy is that “you have to have a law first.”¹³⁷

4.3.4 The Dowry Prohibition Act, 1961 and Specific Penal Code Protections against Dowry

In addition to the provisions of the Dowry Prohibition Act, 1961 (Act 28 of 1961),¹³⁸ the Indian Penal Code (IPC) also contains gender-specific provisions which protect women against cultural exploitations like dowry-related violence/death, *Sati* (Self-immolation), degrading treatment and cruelty to wives by their husbands or his relatives or others.

Under Section 304B IPC, where a woman dies within seven years of her marriage as a result of any burns, bodily injury or in suspicious circumstances and evidence reveals that soon before her death she was subjected to cruelty or harassment by her husband or any of his relatives in connection with any demand for dowry, her death shall be called "dowry death" and her husband or his relative shall be held liable. The punishment upon conviction is seven years to life imprisonment but where the violation amounts only to cruelty, Section 498A IPC prescribes punishment of up to three years imprisonment and a fine.¹³⁹ The burden is also upon the accused persons to prove their innocence because

¹³⁷ Karuna Nundy, “Explaining India’s new anti-rape laws” (Explanatory interview of eminent Indian Supreme Court lawyer), BBC NEWS Asia, 28 March 2013. <http://m.bbc.com/news/world-asia-india-21950197>, (25/7/2014).

¹³⁸ This Act is not discussed separately because copious references have already been made of its relevant provisions in the Introduction of this paper.

¹³⁹ The Section defines "cruelty" to mean any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical); or Harassment of the woman so as to coerce her or any person related to her to meet (or for failing to meet) any unlawful demand for any property.

all dowry related offences in India are strict liability offences under Section 8-A of the Dowry Prohibition Act.

The researcher humbly holds the view that these provisions may verily redress common cruel and dehumanizing socio-cultural practices against women in India and secure their dignity and freedom from exploitation.

4.3.5 The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994

The patriarchal mind-set which promotes the preference of sons to daughters is a common socio-cultural exploitation of women in India.¹⁴⁰ In the *Writ* Petition of *Centre for Enquiry into Health and Allied Themes (CEHAT) & Ors v. Union of India & Ors*,¹⁴¹ the High Court, per Shah J, acknowledged that male child preference is a cultural pandemic in India which continues to plague women and girls, and violate the overall essence of their existence, even before, during and after conception.

The multiplier effect of this exploitative culture is that women suffer gross violations and indignities including sex selection/sex determination which often culminates in the forced abortion of female fetuses, using crude or even advanced modern scientific technology (to ensure that technically, the abortion will not be considered as murder).

In apparent response to this cultural exploitation, the Indian legislature enacted the Pre-conception and Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, a law which prohibited and criminalized predetermination of baby's sex and removal of female fetuses. However, when perpetrators resorted to using advanced medical techniques to determine baby sex and remove female fetuses, thereby

¹⁴⁰ Certain derogatory expression in Asia holds that training a daughter is like watering your neighbour's garden. At the end of the day, it's not yours!

¹⁴¹ *Writ* Petition (civil) 301 of 2000 (Judgement delivered on 10/9/2003). <http://nlrd.org/wp-content/uploads/2012/01/CEHAT-VS-UNION-OF-INDIA.pdf>.

subverting the Act technically, a class action was filed by the petitioners/NGO, *Centre for Enquiry into Health and Allied Themes (CEHAT) & Ors*¹⁴² under Article 32 of the Indian Constitution challenging such continued violation.

Consequently, the Court laid down several new directions which eventually caused the legislature to proactively amend the Act and renamed it "The Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994." The object of the Act was to prohibit, criminalize and prevent medical practitioners and allied personnel from conducting tests to pre-determine the sex of a foetus or giving out information of the sex of a foetus to patients or removing same.¹⁴³

In *State through District Appropriate Authority-cum-Civil Surgeon, Faridabad (Complainant) v. Dr. Anil Sabhani, Prop. M/s Dr. Anil's Ultrasound Opp. G.H. Palwal, Faridabad & 2 Ors*,¹⁴⁴ two medical doctors who violated the Act were convicted on criminal charges and sentenced to two years imprisonment and fine "as a deterrent to other persons, so that no one indulged in such heinous crime."

In a bid to circumvent the Act, the convicts had devised special illegal *codes* as means of conveying the sex of foetus to the patients without even uttering any words. For instance, if they tell the patient to come for her report *on Monday*, it means the foetus is male and if they tell them to come *on Friday*, it means a female. Sometimes too, the doctors merely signs his signature in red ink to indicate a girl or blue ink for a boy. No words are exchanged. It's an unspoken thing and one doesn't even have to ask, she says.¹⁴⁵

¹⁴² *Op.cit.*

¹⁴³ See the Preamble to the Act.

¹⁴⁴ Case No. 295/2 OF 2001; Date of Institution: 5.11.2001/20.7.2004; Date of Decision: 28.3.2006.

¹⁴⁵ National Legal Research Desk, <http://nlrd.org/wp-content/uploads/2012/01/ANIL-SABHANI-CASE-ON-CRIMINAL-ACTION-AGAINST-DOCTORS-FOR-COMMITTINGSEX-DETERMINATION-TEST.pdf>.

The Court held that conduct of the convicted medical practitioners were highly reprehensible and undeserving of leniency because their illegal acts contribute to the unlawful abortion of female foetuses as well as a decline in the sex ratio of girls to boys which may eventually make women extinct in the country.

This interplay of judicial independence and legislative pro-activity is a gigantic advance in India's legal framework which may reasonably be exported to Nigeria and other jurisdictions where the laws are yet inferior.

4.3.6 The Vishaka Guidelines/Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

In *Medha Kotwal Lele & Ors v. Union of India & Ors*,¹⁴⁶ the Supreme Court decried that fifteen years after the *Vishaka guidelines*¹⁴⁷ Parliament was yet to enact a proper law to protect women against sexual harassment at the workplace.

In apparent reaction to this and to underscore the legal importance attached to women's dignity in India, Parliament promulgated the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013¹⁴⁸ 'to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto.'

This Act follows CEDAW and invariably places the guidelines in *Vishaka* within the ambit of Indian Constitutionalism as well as international law. This is clear from its Preamble thus:

¹⁴⁶ (2013) 1 SCC 297 (Judgement delivered on 19 October, 2012).

¹⁴⁷ These guidelines for the prevention and redressal of sexual harassment of women at the workplaces have already been discussed.

¹⁴⁸ With effect from 22 April 2013

WHEREAS sexual harassment results in violation of the fundamental rights of a woman to equality under articles 14 and 15 of the Constitution of India and her right to life and to live with dignity under article 21 of the Constitution and right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment;

AND WHEREAS the protection against sexual harassment and the right to work with dignity are universally recognized human rights by international conventions and instruments such as Convention on the Elimination of all forms of Discrimination against Women, which has been ratified on the 25th June 1993 by the Government of India... it is expedient to make provisions for giving effect to the said Convention for protection of women against sexual harassment at workplace.

This new law fills the legislative vacuum which existed post *Vishaka* and complements the Protection of Women from Domestic Violence Act, 2005 by specifically addressing *sexual harassment of women at workplace* and providing the much needed legislative redress process. This is a further manifestation of legislative pro-activity in strengthening the legal framework for the protection of the dignity of women in India.

The Act protects both employed and unemployed women at their “workplaces” (including domestic servants in private homes or dwelling places) irrespective of age.¹⁴⁹

Section 2 (e) of the Act defines ‘*domestic worker*’ to mean:

a woman who is employed to do household work in any household for remuneration whether in cash or kind, either directly or through an agent on a temporary, permanent, part time or full time basis, but does not include any member of the family of the employer.

¹⁴⁹ The definition of “aggrieved woman” in Section 2 (a) of the Act covers these class of persons.

And by Section 2 (f), “employee” means,

a person employed at a workplace for any work on regular, temporary, *ad hoc* or daily wage basis, either directly or through an agent including a contractor, with or without the knowledge of the principal employer, whether for remuneration or not, or working on a voluntary basis or otherwise, whether the terms of the employment are express or implied, and includes a co-worker, a contract worker, probationer, trainee, apprentice or called by any other such name.

The Act also elaborately defines *workplace* in Section 2 (o) as including:

Any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed directly or indirectly by the Government or its agencies or a co-operative society; or any private sector organisation, enterprise, private society, trust, non-governmental organisation, or service provider engaged in commercial, professional, vocational, educational, sports/recreational, industrial, health (hospitals and nursing homes), financial and allied services including production, supply, sale, distribution or service.

It also includes a dwelling place, a house or *unorganised sector* as well as any place visited by the employee in the course of her employment including transportation provided by the employer for undertaking such journey.

A critical appraisal of the above definitions suggests that the Act does not specifically cover “marital rape” which presumably occurs at a “dwelling place” or “house”. The researcher humbly hold the view that, considering the judicial fearlessness, interpretational innovation, independence and activism common in India, one would not be surprised if, when the need arises, the Indian Supreme Court, applying the rule of “Due Process”, extends the latitude of “domestic worker”, “employee” or “workplace” in the new Act to cover sexual harassment and intimidation of wives or rape by their

husbands or partners at home, in line with the broad meaning of right to life in Article 21 of its Constitution.¹⁵⁰

Generally, the Act is arranged in thirty sections with many sub-sections and clauses comprising twenty core sections and ten miscellaneous sections.

Section 3 (2) of the Act lists the circumstances, acts and behaviour which may constitute sexual harassment to include implied or explicit promise of preferential treatment in a woman's employment, or threat of present or future detrimental treatment in her employment, humiliating her or deliberately creating an intimidating and hostile work environment to unbalance her health or safety.

It also provides a Complaint procedure in Section 9, whereby an aggrieved woman may report sexual harassment in writing to the internal complaint committee or local complaint committee as the case may be (set up by the employer to handle complaints internally), within three months of the incident or three months following the last incident, if there were several. Where the complainant is not literate enough to write, the committee is obliged to assist her to ensure that her complaint is recorded in writing. The committee may also extend the three months period for making a complaint if it deems it necessary and just in the circumstance. But where the aggrieved woman is physically or mentally incapable of making the complaint, or if she is dead, the complaint may be made on her behalf by a personal or legal representative.¹⁵¹

However, at the instance of the aggrieved woman, the internal committee may seek peaceful resolution of the matter before inquiring into her complaint.¹⁵² Pending its final

¹⁵⁰ This is without prejudice to the elaborate provisions of the Protection of Women from Domestic Violence Act, 2005 which already covers all manner of social, economic and sexual violations of a wife or live-in partner by her husband or partner or their relatives.

¹⁵¹ Section 9 (2) of the Act.

¹⁵² Section 10 of the Act provides (1) The Internal Committee or, as the case may be, the Local Committee, may, before initiating an inquiry under Section 11 and at the request of the aggrieved woman take steps to settle the matter between her and the respondent through conciliation: Provided that no monetary settlement shall be made as a basis of conciliation; (2) Where a settlement has been arrived at under sub-section (1), the Internal Committee or the Local Committee, as the case may be, shall record the settlement so

report, the committee may also recommend palliatives including the transfer of either of the parties or the grant of up to three months leave to the aggrieved woman, irrespective of her normal leave.¹⁵³ At the completion of inquiry, the committee shall submit its report and recommendations to the employer or District Officer as the case may be, within ten days and copy the parties.¹⁵⁴ If the committee finds the respondent liable, it may recommend that he be punished for sexual harassment in accordance with the service rules of his workplace and/or that deductions be made from his salary to pay costs or compensation to the aggrieved woman or her legal heirs.¹⁵⁵ But if the committee establishes the innocence of the respondent and that the report/evidence against him was *mala fide* (and not due to mere inability of the woman to prove her case), the committee may also recommend punitive actions against the woman and/or her agents under the service rules.

Under Section 16 of the Act, the result of any inquiry on a complaint of sexual harassment, as well as the identity of the parties and their witnesses shall remain confidential. Even a media report on the justice of the case shall not disclose the identity of the parties, except to refer to them by Alphanumeric only.¹⁵⁶

The researcher considers this confidentiality proviso as a shield against shame which the respondent least deserves, except to the extent that even if the committee finds him liable, he still has a right of appeal under Section 18, otherwise, only the aggrieved woman and her witnesses deserve such confidentiality.

arrived and forward the same to the employer or the District Officer to take action as specified in the recommendation; (4) Where a settlement is arrived at under sub-section (1), no further inquiry shall be conducted by the Internal Committee or the Local Committee, as the case may be.”

¹⁵³ Section 12 (1) and (2).

¹⁵⁴ Section 13.

¹⁵⁵ Section 13 (3) (ii).

¹⁵⁶ Section 17.

4.3.7 The *Rule in Sheela Barse* for the Protection of Women in Custody

In *Sheela Barse v. Union of India*,¹⁵⁷ the Supreme Court of India formulated guidelines based on a class action litigation filed to protect the sexual rights and dignity of women in custody, at a time when no legislation existed on the subject. The *writ* petition followed reports of rape, molestation and sexual exploitation of women and girls held in custody, especially various police lock-ups in India.¹⁵⁸ The Supreme Court Directives in that case became known as the *Rule in Sheela Barse* and they applied to all police lock-ups and detention centres in India. The crux of the rule includes:

1. The interrogation of females must be made in the presence of female police officers.
2. Female suspects must be kept in separate police lock-ups under the supervision of female constables only.
3. The police officer in-charge at any station/post must take responsibility for the safety of women in custody and ensure that bodily searches on them are conducted decently by female officers only.
4. Notice of the rights of arrestees and detainees must be posted conspicuously at police lock-ups.
5. Appointment of female judges or judicial officers to carry out regular surprise visits to police stations to ensure compliance with all the rules.

By these rules, courts could also order that rehabilitation or other special assistance be provided to female inmates in appropriate cases.

¹⁵⁷ AIR 1987 (1) 153.

¹⁵⁸ *Ram Kumar v. S H Pradesh* AIR 1995 SC 1995; *P Rathinam v. S of Gujarat* (1993) 2 Scale 631.

4.3.8 Unique Political Actions to Protect Women's Safety and Sexual Dignity

In addition to the legislative strides and judicial legislation discussed above, the Indian Government has also taken unique political steps to promote and protect the safety, empowerment and sexual dignity of women. This is manifest in three major areas, namely, the setting up of an all-women bank, the Prime Minister's directive on public complaints and the banning of *Uber* Online-hailing taxi services provider in India.¹⁵⁹

4.3.8.1 Bharatiya Mahila Bank [BMB]¹⁶⁰: India's First All-Women Bank

It needs to be restated here, that in November 2013, the then Prime Minister of India, Manmohan Singh¹⁶¹ launched the Bharatiya Mahila Bank in Mumbai. The bank is the first all-women bank in India and was established to provide financial services predominantly to women and women self-help groups as a deliberate policy to promote economic justice and empowerment of women and to broaden the social base for their dignity, integrity and development. It is an all-women's bank because all the eight members of its management board are women.¹⁶²

The bank was established to help women overcome gender-specific economic problems of lack of access to credit capital which could trigger a multiplier effect of demeaning their safety or compromising their sexual dignity. The bank has been described as 'the beginning of a unique new institution' and 'a small step towards economic empowerment of our women'¹⁶³ which will help women overcome gender-specific problems of lack

¹⁵⁹ The need has not arisen to make such taxi ban in Nigeria, however other unique political measures announced by the Indian government for the safety and dignity of women are not available for women in Nigeria. Meanwhile, the president-elect of Nigeria, Gen. Muhammadu Buhari in his "Special message to Nigerian women" on the International women Day, 2015, restated his commitment to empowering Nigerian women. According to him, "my plan for Nigerian women has been made clear in 'My Manifesto and Vision for Nigeria.' In his said Manifesto and Vision for Nigeria document released to the media in Dec. 2014, Buhari said that: "Women all over the world are playing an ever increasing role in moving their nations forward both in and outside government. In keeping with the times, my government will ensure that Nigerian women are given the opportunity to rise and play an even more prominent role in moving out great nation forward. See Vanguard Newspaper, Nigeria Online of 8 March, 2015 at: <http://www.vanguardngr.com/2015/03/womens-day-buhari-restates-commitment-to-empowering-women/#sthash.MWZJXIWp.dpuf> (18/5/2015).

¹⁶⁰ Hindi Language Translation of *Indian Women Bank*.

¹⁶¹ Former Chief Minister of Gujarat, Narendra Modi is India's new Prime Minister, elected May 2014.

¹⁶² The BMB has an all-woman, eight member board of directors.

http://zeenews.india.com/business/news/economy/bharatiya-mahila-bank-for-economic-empowerment-of-women-pm_89058.html (25/11/2013).

¹⁶³ See The Prime Minister's remark, *Ibid*.

of access to credit capital due to inherent difficulty in furnishing collateral because family property are usually not registered in their names.¹⁶⁴ This marks another political high point for economic empowerment of women in India which suggests a parameter for sustainable legal framework for protecting women's dignity.

4.3.8.2 Direct Access to Prime Minister for Public Complaints

Even though the dictum of epistolary jurisdiction of courts is a landmark of the Indian judicial process which has worked towards the protection of women's right to dignity in India, still the current Indian Prime Minister, Mr. Narendra Modi, upon assuming office in 2014, made a bold directive for advancement of women's dignity and sexual independence in India. He directed that all persons, especially women and girls, whose right to dignity have been violated and who have no facility, means or capacity to report to the police or initiate judicial process, may complain directly to his office or to him personally via any of his social media pages on Facebook or Twitter, which are made public.¹⁶⁵ This bold political action enlarges the scope of access jurisprudence in India, especially for women who believe or think that the police will down-play their reports of violations.

4.3.8.3 Banning of *Uber* Online-Hailing Taxi Services in India

The Indian media reported that, following allegation that a taxi driver employed by the online cab-hailing services company, *Uber*, was arrested for allegedly raping a 27-year-old female passenger, the transport department of the Indian Government blacklisted and banned 'all operations and transport services

¹⁶⁴ *Ibid.* See remark by India's Finance Minister P. Chidambaram at the launching of the bank.

¹⁶⁵ Office Address: South Block, Raisin Hill, New Delhi-110011, India, Fax: +91-11-23019545, Tel: +91-11-23012312, Official Website: www.narendramodi.in; Residential Address: 7 Race Course Road, New Delhi, India; Facebook Page: [facebook.com/narendramodi.official](https://www.facebook.com/narendramodi.official); Twitter Account: twitter.com/narendramodi; Google Plus Account: plus.google.com/+NarendraModi; YouTube Channel: youtube.com/user/narendramodi. <http://www.indiancelebinfo.com/2014/10/narendra-modi-office-contact-address-email-phone-number-website.html> (29/4/2015).

provided by www.uber.com with immediate effect.’¹⁶⁶ This shows the pro-active political steps taken by the Indian Government towards protecting the dignity of women.

The Government in New Delhi held the US-based company *Uber* vicariously liable for the violation of the woman’s dignity because it neglected to show diligent care for the safety and sexual dignity of its prospective female passengers. Reasons: Shiv Kumar Yadav, the 32-year-old cab driver who allegedly raped the passenger had previously been jailed seven month for rape in 2011, and for *Uber* to have employed him at the risk of the general safety of women without being diligent enough to have run a background check and obtained police clearance on him and its other drivers for the safety of the general public.

4.3.8.4 Introduction of New “Social Justice Bench” at the Supreme Court

One of the assurances in the Preamble to the Indian Constitution is the assurance of “Social justice,” which generally includes the safety and secure living conditions for the vulnerable group including women and children. And to actualize this assurance, the Indian Supreme Court has set up a new bench known as the “Social Justice Bench”¹⁶⁷

His Lordship the Chief Justice of India ordered constitution of this Special Bench to facilitate early and specialized disposal of both new and pending cases relating specifically to the vulnerable members of society especially women and children.¹⁶⁸

The Chief Justice further directed that this Bench would sit on every working Friday at 2.00 p.m. with effect from 1st December, 2014, and will be monitored regularly¹⁶⁹ to ensure optimum realization of the assurance of the “social justice” intent of the Indian Constitution.

¹⁶⁶ The Times of India, Delhi 8 Dec, 2014: <http://timesofindia.indiatimes.com/city/delhi/Delhi-govt-bans-Uber-cab-service-following-rape-incident/articleshow/45411516.cms> (28/4/2015).

¹⁶⁷ LAW RESOURCE INDIA, 3 December, 2014: <https://indialawyers.wordpress.com/2014/12/03/supreme-court-constitutes-a-special-bench-titled-as-social-justice-bench-for-hearing-matters-related-to-women-and-children/> (30/4/2015).

¹⁶⁸ *Ibid.*

This underscores the seriousness and proactivity in law and policy relating to women's dignity and protection in India.

4.3.8.5 Comprehensive Legal and Counselling Centres and 181 Mobile Helpline Services for Women in Distress

In his message to the International Women's Day on 8 March, 2015, Indian Prime Minister Narendra Modi announced the "setting up one-stop-centres that will provide assistance, legal advice and psychological counselling to women who face violence or abuse. The Government is also commencing a mobile helpline to enable women to dial 181 for access to counselling and referral services."¹⁷⁰

This is a major policy stride aimed at protecting women's safety and dignity and bringing positive change in the lives of women. In the words of the Prime Minister, "We must walk shoulder-to-shoulder to end all forms of discrimination or injustice against women."¹⁷¹

4.3.8.6 Opening of 24-Hours Gender Help-Desk Centres for Women and Children

In the Indian State of Kerala, a 24 hour gender help desk centres have been opened for providing short term gender shelter facility, medical help, legal support and counselling to those women and children, who are the victims of the domestic violence.¹⁷²

¹⁶⁹ This Bench will comprise of Hon'ble Mr. Justice Uday U. Lalit, and Hon'ble Mr. Justice Madan B. Lokur.

¹⁷⁰ PMINDIA, Text of PM's Message on International Women's Day, 08 Mar, 2015, available at http://pmindia.gov.in/en/news_updates/text-of-pms-message-on-international-womens-day/ (28/12/2015).

¹⁷¹ See Text of Indian PM's Message on International women's day, March 8, 2015, <http://www.narendramodi.in/text-of-pms-message-on-international-womens-day> (18/5/2015); <http://www.ndtv.com/india-news/committed-to-bring-positive-change-in-womens-lives-prime-minister-narendra-modi-744962> (18/5/2015).

¹⁷² Kerala Women: An initiative of Kerala Social Welfare Department <http://www.keralawomen.gov.in/index.php/headlines/333-24-hour-gender-help-desk-centres-for-women-and-children>. (18/5/2015).

4.3.8.7 Launching of *SOTERIA* Free Emergency Android Application for Women's Safety and Crime Control

Smacon Technologies Tripunithura, India has also developed a smart emergency android application known as *SOTERIA* to provide help for women in distress. This mobile app which can be downloaded from the Google App store in android/smart phones derives its name from the Greek Goddess Soteria, which is regarded in the Greek Mythology as the goddess of safety, protection, preservation and deliverance from harm.

Normally, on the *Soteria* App SETTINGS, the user saves the mobile phone numbers of three most important persons from whom she would expect help during an emergency. And once distressed or in need of help, she can send out SOS or distress call by simply touching or dialling the CALL option in the *Soteria* app on her android/smart phone or devise. This would automatically send and deliver information of her location as text message to the three saved numbers. Her location can then be traced through the location tower of mobile application or Google API or GPS technology. The *Soteria* application can also send instant status updates in Facebook.¹⁷³

This application is an unrivalled mobile advance specially introduced in India to provide safety for women and enhance protection of their right to dignity.¹⁷⁴ Although there seem to be more reported cases of public rape and violation of women's sexual dignity in India than in Nigeria, the *Soteria* app is still considered a remarkable lesson which may be reasonably applied with respect to cases of marital rape, sexual harassment and other forms violence or abuse which reduce the dignity of women.

¹⁷³ Currently, the *Soteria* emergency/safety mobile app is most popular in Urban India, where of course, the cases of violation of women's sexual dignity are more endemic. But one would reasonably wonder what happens with respect to remote areas of rural India where there are no internet facilities and mobile service networks or where these facilities have weak signals. And the fact that most women may be too poor to own smart phones, or too illiterate to use or operate one, it is therefore humbly suggested that for *Soteria* to be most effective, government or in partnership with relevant NGOs should take steps to provide these mobile devices or other form of alarming/alert systems for these women and educate them on how to use them.

¹⁷⁴ Kerala Women: An initiative of Kerala State Social Welfare Department-
<http://www.keralawomen.gov.in/index.php/headlines/260-android-application-soteria-to-help-women> (20/5/2015).

4.3.8.8 Setting Up of a Special NIRBHAYA (“Fearless” or “No Fear”) Fund for Women's Safety

Nirbhaya is the Hindu word for “fearless one” or “no fear”.¹⁷⁵ The Indian Government set up a special *Nirbhaya* Fund for women’s safety and dignity, in memory of the young Indian woman, who died at a Singapore hospital, two weeks after she had been brutally gang-raped in a moving bus in New Delhi. The Fund has an initial corpus of Rs10 billion (approximately USD157 Million). The essence of the fund is to assist and rehabilitate women who face threat or fall victims of such indignity as sexual violation.¹⁷⁶ There are also special *Nirbhaya* vigilante/surveillance patrols around Bhopal, India providing additional security for women.

4.3.9 Critique of the Indian Legislative and Policy Framework

In spite of advances in the recent enactment of the Criminal Law (Amendment) Act, 2013 in India and the various amendments therein contained, some remarkable gaps remain evident in its legislative framework for the protection of women’s right to dignity, especially against sexual violations.

Authoritative media report¹⁷⁷ also revealed that Indian activist Ranjana Kumari, director of the non-profit Centre for Social Research, applauded the amendment in the Criminal Laws (Amendment) Act, 2013 which provides a penalty for police and law enforcement officers who fail to register cases of assault or sexual harassment filed by women, as a sure way of “ending the culture of shame that surrounds victims of sexual crimes, so they don't feel afraid to approach police when they are attacked.” Unfortunately

¹⁷⁵ In this case, the word is used as a pseudonym for the Delhi bus rape victim since the Indian criminal jurisprudence does not permit the description of rape victims by name.

¹⁷⁶ <http://www.dnaindia.com/india/report-nirbhaya-fund-of-rs1000-crore-for-womens-safety-announced-1805651> (19/5/2015).

¹⁷⁷ South China Morning Post, International Edition: Asia. “Activists Welcome India's Anti-rape Law, With Caution” Agence France-Presse (AFP) Wednesday, 20 March, 2013, <http://www.scmp.com/news/asia/article/1195588/activists-welcome-indias-anti-rape-law-caution> (29/10/2014).

however, the law protects Armed forces personnel in “disturbed areas” from prosecution for rape and sexual assault, even though war-time rape under the Rome Statute.¹⁷⁸

The legislation is also defective in not raising the punishment for acid attacks on women from a minimum seven-year jail term to a proposed sentence of life imprisonment as well as making no special provision for incest or prescribing tougher penal sanction for trafficking in children, especially the girl-child.

It is also a minus that the new legislation still does not criminalize marital/spousal rape. This “oversight” according to activist Sudha Sundararaman of the All India Democratic Women's Association, contravenes the Indian Constitution, "which considers women as equal human beings who have a right to live with dignity and be free from violence within and outside marriage."¹⁷⁹ The non-criminalisation of rape of a wife by her husband is a clear disregard of the Verma Committee report which had said that this exception "stems from an outdated patriarchal notion of marriage which regarded wives as no more than the property of their husbands..."¹⁸⁰

The Indian criminal legislation on rape and sexual abuse of women has also been criticised as being pro-establishment and encourages “celebrity justice” because it fails to depart from the old order whereby political office holders and parliamentarians facing rape charges continue to hold their offices and positions until their final conviction, while as, on moral grounds of public decency and sensitivity they should vacate their offices until they are cleared by the courts.

¹⁷⁸ Article 7(1)(g) of the Rome Statute lists rape, alongside sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity, as a crime against humanity. See also Ambos, K. (2012). *Sexual Offences in International Criminal Law, with a Special Focus on the Rome Statute of the International Criminal Court. Understanding and Proving International Sex Crimes, Beijing*, 143-173 and Maier, N. B. (2011). The Crime of Rape under the Rome Statute of the ICC (with a special emphasis on the jurisprudence of the Ad Hoc Criminal Tribunals). In *Amsterdam Law Forum* (Vol. 3, No. 2, p. 146).

¹⁷⁹ See “Women's activists sore with rape law” The Times on India, March 20, 2013. <http://timesofindia.indiatimes.com/india/Womens-activists-sore-with-rape-law/articleshow/19081635.cms> (29/10/2014).

¹⁸⁰ <http://timesofindia.indiatimes.com/india/Womens-activists-sore-with-rape-law/articleshow/19081635.cms>, *ibid*.

The new law has also removed the specific words "social, economic and political" from Clause (k) under Section 376(2) of the Indian Penal Code (IPC)," thus diluting the suggestion in the proposed government Bill of 2010 which had said that rape committed by a person in a position of "social, economic and political" dominance would be considered an aggravated offence.

It is also a legislative *lacuna* that the law still retains rape as a gender-specific offence which can only, legally be committed against women and girls even though rape of young boys and men also remain an open secret in India. Similarly, the law does not protect lesbians, same-sex couples and transgender from sexual assault and rape.

Furthermore, it is also imperative that future amendments with regards to the amended Section 119 of the Indian Evidence Act, 1872 (which requires the Court to employ the assistance of an interpreter or a special educator who will record and video graph the statement, signs or writings of a dumb or disable witness), should contain a proviso for such interpreters or special educators to perform their duty under Oath.

4.3.10 The Way Forward

The following suggestions are hereby recommended to fortify the legislative and policy framework for the protection of the right to dignity of women in India.

1. Although India is applauded for providing elaborate national legislation on equal gender rights which *inter alia* punishes acts of dowry, rape, sexual harassment, stalking, voyeurism, disrobing, discrimination against Dalits, and sex-selective abortions, the CEDAW Committee Report, 2000 expressed worry about the lack of implementation of laws and the inadequate allocation of resources for women's development in the social sector, which they saw as serious

impediments to the realization of women's human rights in India. It is therefore recommended that India should make haste to addresses this.

2. With regards to protecting the right to dignity of women with disabilities, it is recommended that special educators and interpreters be employed at police offices and courts that shall be present from the time of recording the complaint of the violated disabled woman or girl by the police up till the time of trial in court. This will take care of such situation as arose in two prominent scenarios cited in a recent research,¹⁸¹ firstly, disabled women (for instance deaf and dumb women) are unable to communicate or give evidence of the act of sexual assault committed against them, and even if they do, little or no weight is attached to it by the police and courts which means that if per chance the accused is convicted by the lower court, it is most likely that an appeal court will set aside the conviction "owing to the non-recording of the prosecutrix' testimony or non-observance of the legal procedure by the court below."¹⁸²

Secondly, the family of a teenage deaf and dumb patient reported on February 29, 2012 that a junior doctor had raped their daughter while she was a patient at the Bankura Sammilani Medical College Hospital. But unfortunately there could be no prosecution because the investigating Superintendent of Police Pranab Kumar had said, "It is difficult for us to investigate because the victim is deaf and dumb and we need an interpreter."¹⁸³

It must however be noted that in the recent murder case of *State of Rajasthan v Darshan Singh*,¹⁸⁴ the Supreme Court of India emphasised that there is nothing, in law or otherwise which disqualifies or prevents a deaf and dumb person from

¹⁸¹ Badjena, S. S. (2014). Sexual Violence Against Women with Disabilities and the Legislative Measures in India. *ODISHA REVIEW* (April-May 2014), 46-57, esp 47-48.

¹⁸² *Ibid* at 49.

¹⁸³ *Ibid* at 47.

¹⁸⁴ (2012) 5 SCC789

being a credible and competent witness, even though in that case, the court refused to rely on the testimony of the wife of the deceased, who was deaf and dumb and who was an eyewitness to the incident, because the interpreter of her evidence at the trial was her father, and that being an ‘interested party’ it was unsafe for the Court to convict the accused on basis of his interpretation of the witness’ testimony because of a likelihood of bias.

It must also be noted that with the enactment of the Criminal Law (Amendment) Act, 2013, the punishment for the rape of a physically or mentally disabled woman under Section 376 (2) of the Penal Code now ranges from 10 years minimum imprisonment to life imprisonment. This amendment therefore breaches the *lacuna* which exists in the PWD Act, 1995.

Additionally, the Criminal Law (Amendment) Act, 2013 also amends Section 119 of the Indian Evidence Act, 1872 and accordingly, a witness who is unable to speak because she is dumb may give her evidence in any other manner in which she can make it intelligible, as by writing or by signs which must be made in open Court and such evidence shall be deemed to be oral evidence, provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement and such statement shall be video graphed.

On this note, it is additionally suggested that every such special educators or interpreters which the researcher had earlier recommended to be attached to the police or the courts must be sworn to the oath of truth which will be regulated by the law on perjury as this would resolve the kind of issue earlier mentioned in the murder case of *State of Rajasthan v Darshan Singh*.¹⁸⁵

¹⁸⁵ (*Supra*)

The researcher further reiterate the call by the media for urgent reform in the composition of rural administrative bodies (*panchayats*) where women-only groups should be invested with the authority to adjudicate on women-centric issues. *Panchayats* comprised of men have been known to recommend that survivors of rape marry their rapists, if he is merciful enough to consider marrying her, so the woman can reintegrate into society. This is because a raped woman, in their view, becomes a repository of indelible shame. Aside from issues directly affecting them, women must be made a more inclusive part of decision-making at all levels of Indian society.¹⁸⁶

3. It must be conceded that in spite of basic constitutional and legislative provisions for the protection of women's dignity in India, especially with respect to sexual abuse and rape, coupled with the unprecedented activism of the India Supreme Court with regards to fundamental rights generally, women still face the threat of rape as a major form of indignity and humiliation. Even after the notorious December 2012 gang-rape cum murder of a medical student,¹⁸⁷ recent media reports record the following humiliating cases of sexual violation of women in India, namely:

- I. "Indian police gang-rape woman after she fails to pay bribe."¹⁸⁸
- II. "Alleged gang rape, hanging of 2 girls in India sparks global outrage."¹⁸⁹
- III. "13 men in West Bengal, gang-raped a 20-year old tribal woman on the orders of village elders, as punishment for having a relationship with a man from a different community."¹⁹⁰

¹⁸⁶ <http://www.theguardian.com/commentisfree/2014/jun/17/sexual-violence-india-patriarchal-narendra-modi-women-reform-rape>. (14/11/2014)

¹⁸⁷ "A 23-year-old Indian student was fatally gang-raped inside a bus in the capital, Delhi last December. The attack caused international outrage and prompted India to introduce stringent anti-rape laws. A court sentenced her attackers to death this September." (BBC NEWS Asia, 16 December 2013). <http://www.bbc.com/news/world-asia-india-25344403> (26/7/2014).

¹⁸⁸ The Guardian, 12 June 2014, <http://www.theguardian.com/world/2014/jun/12/indian-police-gang-rape-uttar-pradesh> (12/7/2014).

¹⁸⁹ CNN International edition, 30 May 2014, <http://edition.cnn.com/2014/05/29/world/asia/india-gang-rape/>, (12/7/2014).

- IV. “Girl, 10, raped at the command of village chief in Jharkhand, India.”¹⁹¹
- V. In a public statement, Kolkata MP Tapas Pal, of the Trinamool Congress (TMC) party threatened to shoot opposition party men and “unleash my boys” to rape their women. Although he later made a public apology for this, advocate Bijayan Ghosh has filed a Public Interest Litigation at the Supreme Court seeking a probe by the Criminal Bureau of Investigation (CBI) as he alleged that the West Bengal Police and the state government were treating the issue in a mere “partisan” manner.¹⁹²
- VI. “India six-year-old ‘raped in Bangalore school by staff members’”¹⁹³

In the light of the foregoing, the researcher recommends that India should advance effort in civic education, moral instructions in schools, economic empowerment of women and special training and support for law enforcement personnel. Rape laws should be made gender neutral because even the custodial sexual abuse of boys is becoming rampant.¹⁹⁴

4. Women rights NGOs and civil society groups as well as corporate bodies should show greater involvement in the funding, propagation and participation as part of a larger campaign for the protection of human dignity, especially of the vulnerable but with emphasis on the dignity of women.¹⁹⁵

¹⁹⁰ National Legal Research Desk, 28 Mar 2014). <http://nlrd.org/author/ravikantsv> (29/3/2014)

¹⁹¹ news.com.au 11 July 2014, <http://www.news.com.au/world/girl-10-raped-at-the-command-of-village-chief-in-jharkhand-india/story-fndir2ev-1226985244797> (12/7/2014). See also The Times Asia, 11 July 2014, <http://www.thetimes.co.uk/tto/news/world/asia/article4144286.ece> (12/7/2014).

¹⁹² Oneindia News, 5 July 2014, <http://news.oneindia.in/india/sc-moved-seeking-cbi-probe-against-tapas-pal-s-remarks-1477556.html> (12/7/2014).

¹⁹³ BBC NEWS Asia, 17 July 2014. <http://www.bbc.com/news/world-asia-india-28340617>, (25/7/2014).

¹⁹⁴ Mehta, Siddharth. "Rape Law in India: Problems in Prosecution Due to Loopholes in the Law." *Available at SSRN* 2250448 (2013).

¹⁹⁵ Wiseberg, Laurie S., and Harry M. Scoble. "Women's Rights and International Human Rights: A Bibliographical Note." *Human Rights Quarterly* 3.2 (1981): 127-135.

5. A special role may also be considered for religious groups and leaders for the dissemination of caution and counselling against the abuse and rape of women by ensuring that they propagate “truth” and not “negative” religious teachings which trivialize condone or encourage sexual abuse of women.¹⁹⁶ There is also need to emphasise peace and tolerance among the various sects and castes in India because rape has sometimes been linked to social factors like revenge, vengeance, clannish violence and war.¹⁹⁷ But if these measures fail to secure the necessary attitudinal change against rape in India, especially child-rape, this researcher may be constrained to join the debate that “castration” (as against other debates for death penalty for such heinous crimes)¹⁹⁸ be codified as “a befitting sentence on any paedophile or any serial offender.”¹⁹⁹ This is without prejudice to the fact that the Justice J.S. Verma Committee had earlier rejected the proposal for chemical castration as it fails to treat the social foundations of rape. It opined that death penalty should not be imposed for the offence of rape, as there was considerable evidence that death penalty has not deterred serious crimes.²⁰⁰ Rather, it recommended life imprisonment for rape. This research hereby recommends the relationship between rape and punishment as a subject for further research.

4.4 Legislative and Policy Framework: SOUTH AFRICA

The two main legislation for the protection of women and the girl-child’s dignity against all manner of violence including sexual indignity are the Domestic Violence Act

¹⁹⁶ Metcalf, Barbara D. "Imrana: Rape, Islam, and law in India." *Islamic studies* (2006): 389-412.

¹⁹⁷ Murthi, Meera. "Who is to Blame? Rape of Hindu-Muslim Women in Interethnic Violence in India." *Psychology of Women Quarterly* 33.4 (2009): 453-462.

¹⁹⁸ Kumar, Radha. *From Chipko to Sati: The contemporary Indian women's movement*. Westview Press, 1995; D'Avella, Joanna H. "Death Row for Child Rape-Cruel and Unusual Punishment under the Roper-Atkins Evolving Standards of Decency Framework." *Cornell L. Rev.* 92 (2006): 129; Hartman, Joan F. "Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty." *U. Cin. L. Rev.* 52 (1983): 655.

¹⁹⁹ Mehta, Siddharth. "Rape Law in India: Problems in Prosecution Due to Loopholes in the Law," *ibid*.

²⁰⁰ Summary Report of the Committee on Amendments to Criminal Law, 2013, PRS Legislative Research, Centre for Policy Research, India, 25 January 2013. www.prsindia.org; <http://www.prsindia.org/administrator/uploads/general/1359132636~~Justice%20Verma%20Committee%20Report%20Summary.pdf> (30/10/2014).

No. 116 of 1998 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.

Some researchers have also expressed the view that the keen local and international lobby by women groups in the mid-1990s after South Africa's first democratic election and subsequent ratification of the CEDAW Convention led to the enactment of "the *Domestic Violence Act No. 116* in 1998 followed a decade later by the *Criminal Law (Sexual Offense and Related Matters) Act No. 32* of 2007," and that "the struggle for the promulgation of these two Acts brought South African women together irrespective of their race, class, and politics."²⁰¹

4.4.1 Domestic Violence Act No. 116 of 1998

This Act is implemented under the Department of Social Development and it is the "main act that directly addresses VAW (violence against women) in South Africa."²⁰²

The Act has 22 chapters and its Section 21(1) repeals Sections 1, 2, 3, 6, and 7 of the Prevention of Family Violence Act 133 of 1993.

Basically, it contains a number of broad and peculiar provisions for the protection of women's dignity against all forms of violence (including domestic violence) and for which it is globally applauded as "the most inclusive and progressive pieces of legislation."²⁰³

Firstly, Section 1 of the Act defines domestic violence in very elaborate terms to include sexual abuse; physical abuse; emotional, psychological abuse; verbal and economic

²⁰¹ Mogale, R. S., Burns, K. K., & Richter, S. (2012). Violence Against Women in South Africa: Policy Position and Recommendations. *Violence Against Women*, 18(5), 580-594. doi: 10.1177/1077801212453430 <http://vaw.sagepub.com> (10/6/2015) at 583. Further at p.587, the authors were emphatic that "A key activist event was the advocacy campaign that was conducted by Soul City Institute for Health and Development Communication in partnership with the National Network on Violence against Women, a national network of various South African women's movements and activists." See also Maker, A., Malepe, L., Christofides, N., & Usdin, S. (2000). The value of advocacy in promoting social change: Implementing the new domestic violence act in South Africa. *Reproductive Health Matters*, 8(16), 55-65.

²⁰² Mogale, R. S., Burns, K. K., & Richter, S. (2012). Violence Against Women in South Africa: Policy Position and Recommendations. *Violence Against Women*, 18(5), 580-594.

²⁰³ Mogale, R. S., Burns, K. K., & Richter, S. (2012). Violence Against Women in South Africa: Policy Position and Recommendations. *Violence Against Women*, 18(5), 580-594. doi: 10.1177/1077801212453430 <http://vaw.sagepub.com> (10/6/2015) at 581, citing Cooper, D., Morroni, C., Orner, P., Moodley, J., Harries J., & Cullingworth, L., et al. (2004). Ten years of democracy in South Africa: Documenting transformation in reproductive health policy and status. *Reproductive Health Matters*, 12(24), 70-85.

abuse. The Section also lists a broad range of acts which constitute domestic violence to include harassment; intimidation; stalking; forceful unconsented entry into the complainant's residence; damage to property as well as any other behaviour which is intended to unduly subjugate the complainant.²⁰⁴

Secondly, it recognizes domestic violence as that form of VAW which can be perpetuated at home by close family members or friends including spouses, and thus compels the violator to support the victim and her children, if any, financially even if they are not living together;

Thirdly, it gives wider arrest powers to the courts including the powers to grant protection orders²⁰⁵ on violators upon application by the complainant with regards to victim's safety at home or workplace,²⁰⁶ otherwise the abuser may be jailed for five years.²⁰⁷

Fourthly, its Section 2 obliges the police to ensure adequate protection of the victim including medical assistance; explaining her rights to her; helping her find a safe alternative place to stay, away from the home she shares with the abusive partner, family member or spouse. It lists other duties of the police in the circumstance as well as penalties for not carrying out such duties.²⁰⁸ An officer may also arrest a violator without warrant at the scene of the violation.

Section 12 grants extra-territorial jurisdictions to courts which will enable a victim gain quicker access to justice.

²⁰⁴ Violence Against women in Africa: A resource for journalists. (1999). South Africa: Soul City Institute for Health and Development Communication, p. 11.

²⁰⁵ Section 6-7 of the Act.

²⁰⁶ Section 4 of the Act.

²⁰⁷ Section 17 of the Act.

²⁰⁸ See Mogale, R. S., Burns, K. K., & Richter, S. (2012), *ibid* p. 581-582 quoting Smythe, D. (2004, June) Norms and Architecture: Limits on Rape Law in South Africa, Conference Papers—Law & Society Association. Retrieved from http://www.allacademic.com/meta/p117019_index.htm.

One very significant aspect of this law is the introduction of a “no-drop Charges” regulation in Section 18 which provides that under no circumstance will charges be refused or withdrawn for a violator of the Act. This thesis therefore agrees with other authors²⁰⁹ that this provision, if decisively implemented, is capable of scaring perpetrators and advancing the impact and object of the *Domestic Violence Act*, thereby promoting the legislative framework for protection of women’s dignity in South Africa.

4.4.2 Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007 (also known as the Sexual Offences Act)²¹⁰, took effect from 16 December 2007 after President Thabo Mbeki signed it into law.

The Act has seven chapters, 72 sections and 1 Schedule which contains the list of legislation amended or repealed by this Act.²¹¹

Chapter one contains the object of the Act which includes: consolidation of all laws on sexual offences in South Africa into one; criminalizing all forms of sexual abuse and exploitation of all persons including women, children and the mentally disabled; repeal of certain common law sexual offences and replacing them with new, extended or expanded gender-neutral statutory sexual offences; promoting timeous justice delivery mechanism with respect to all sexual offences; providing uniform legislation and application in relation to sexual offences throughout the country; providing services to victims of sexual violations and establishing a national register for sex offenders.²¹²

²⁰⁹ Mogale, R. S., Burns, K. K., & Richter, S. (2012), op. cit. at 590.

²¹⁰ As amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2013, See Government Gazette No. 36645 of 9 July, 2013; also available free online at www.gpwonline.co.za (9/6/2015). By its Section 68, it amends among others, certain aspects of the Sexual Offences Act No. 23 of 1957 and repeals its Sections 9, 11, 12(2), 13-15, 18, 18A and 20A.

²¹¹ Section 68 of the Act.

²¹² Section 2 of the Act.

Imperatively, Section 1(1)(a) defines a child to mean “a person under the age of 18 years” or in relation to Sections 15 and 16, a person who is up to 12 years but below 16 years.²¹³

Chapter two criminalizes various forms of self or compelled sexual offences.²¹⁴ Its Sections 3 to 14 criminalizes rape generally. Its Section 3 defines “rape” as the unlawful and intentional act of sexual penetration of another without consent while “compelled rape” occurs when one compels a second party to have unlawful sexual penetration of a third party without consent. This is a deviation from the common law offence of indecent assault.

Chapter three deals specifically with sexual offences against children in Sections 15 to 22 while chapter four criminalizes sexual violations of the mentally disabled in Sections 23 to 26. In Section 72, the Act makes provision for implementing Chapters 1 to 4 and 7 (on the creation of statutory sexual offences, special protection measures for children and the mentally disabled including certain transitional provisions relating to evidence). The Act enacts new, expanded or amended sexual offences against children and the mentally disabled including grooming, display or exposure to child pornography or witnessing/compulsion to partake in lewd sexual acts involving the erotic touching or arousing of private parts of the body. Although some of these offences also apply to adults, the Act nonetheless seek to specifically protect these vulnerable groups, namely, women, children and the mentally challenged.

The Act will *inter alia*, facilitate South Africa’s effort on the protection of women and girl-child’s dignity against sexual violations which are commonplace because it generally repeals old common law concept of rape and replaces it with a new expanded

²¹³ Section 1(1)(b) of the Act. The said Section 15 and 16 criminalizes statutory rape and statutory sexual assault of a child respectively irrespective of the child giving consent. Suffice to say that Section 15 seeks to criminalise acts of sexual penetration by adults with children who are aged between 12 and 16 even if they give consent while Section 16 aims to criminalise acts of consensual sexual violation committed by adults with children aged 12 to 16 years.

²¹⁴ For instance, Section 7 defines compelled self-sexual assault to cover all forms unlawful and intentional compelling of another to engage one in masturbation, arousal and stimulation of the female breasts, or penetration of the anus or genitals.

statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender.²¹⁵ The Act meets contemporary standard of international law whereby rape becomes an offence which may be committed by/against man or woman, boy/girl. This places it above the legislative framework in India and Nigeria where rape remains a gender-specific offence.

Chapter five of the Act prescribes compulsory HIV test for sex offenders, the result of which may be used as evidence in a civil action for damages against the offender, or as evidence in his criminal trial or help in counselling the victim to enable her seek medical support or appropriate life-saving steps or lifestyle.²¹⁶ It also abolishes secondary traumatization of victims and gives the victim the right to receive Postexposure Prophylaxis (PEP) treatment for HIV/AIDS.²¹⁷

Section 35 obliges relevant organs of state to keep record of all reported cases of sexual violations as well as the Orders or decisions taken in respect of each case. This is a necessary step for forward-planning and evaluation of the impact of the Act on the upward or downward flow of sexual offences in the country.

As a long-term punitive measure against sexual offenders, chapter six of the Act prescribes in Section 40 that a national register of sexual offenders be kept so that such violators may be denied entry into certain form of employment or care facility where children and disabled persons are kept.

²¹⁵ Under the Sexual Offences Act, any form of sexual penetration aside the traditional penis to vagina (such as with fingers or the tongue or penetration by objects 'into or beyond the genital organs or anus of another person' (male or female) qualifies as 'sexual penetration.' Suffice to say that 'sexual penetration' is much more widely defined than the common-law crime of rape which required penile penetration of the vagina only. See McQuoid-Mason, D. (2011). Mandatory reporting of sexual abuse under the Sexual Offences Act and the 'best interests of the child'. *South African Journal of Bioethics and Law*, 4(2), 74-78.

²¹⁶ Sections 28-33 of the Act.

²¹⁷ Mogale, R. S., Burns, K. K., & Richter, S. (2012). Violence Against Women in South Africa: Policy Position and Recommendations. *Violence Against Women*, 18(5), 580-594. doi: 10.1177/1077801212453430 <http://vaw.sagepub.com> (10/6/2015) at p. 582.

Chapter seven contains the general provisions which include an obligation under Section 54 to report the commission of sexual offences against children and the disabled, failure of which carries a jail term of five years or a fine or both.

By Sections 56 and 57 of the Act, the consent of a child to an unlawful sexual act or marriage between the victim and violator of a sexual offence respectively cannot avail as a defence at the trial of an offender while Section 61 permits extra-territorial jurisdiction of courts with respect to the trial of sex offenders.

With special reference to the evidence at the trial and sentencing of a sexual offence violator under the Act, Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 now states that:

Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before the court, with caution, on account of the nature of the offence.

Section 59 of the same Act also attempts to protect survivors stating that “In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw an inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.”

This amendment Act is further strengthened by the Criminal Law (Sentencing) Amendment Act No. 38 of 2007 (also known as the Sentencing Act) which provide minimum sentencing guidelines for rape, along with unsatisfactory and prohibited reasons for justifying a lesser sentence. Consequently, the Criminal Law (Sentencing) Amendment Act No. 38 of 2007 now removes all previous mitigating factors which were available to an accused person charged with rape or sexual offence and in consideration of which the trial court may impose a lesser sentence on him.

Section 3 (aA) of the Sentencing Act now states thus: “When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence: (i) The complainants previous sexual history: (ii) an apparent lack of physical injury to the complainant (iii) an accused person’s cultural or religious beliefs about rape or (iv) any relationship between the accused person and the complainant prior to the offence being committed.” This is a clear legislative commitment to protect the right to dignity of women and the girl-child against sexual abuse in South Africa.²¹⁸

For administrative judicial convenience in justice delivery in sexual offences especially in relation to children, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, was further amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2013²¹⁹ with the purpose of empowering the Minister to designate new Sexual Offences Court to ensure proper implementation of the parent Act. By the amendment to Section 55A (1) and (2) of the Act, the Minister may in consultation with the National Director of Public Prosecution, the Chief Justice of the Republic, and the administrative head of that particular court, designate any Magistrate’s Court or High Court to sit as a Sexual offences Court and hear related matters accordingly. This designation however, does not remove or limit the jurisdiction of other courts with respect to the hearing of sexual offences.²²⁰

Additionally, the Act makes provision for the establishment of the National Inter-Sectoral Committee on the Sexual Offences Amendment Act whose function must

²¹⁸ But in Nigeria, Marital rape is even justified by the combined interpretation of Section 357 of the Criminal Code Act Cap 77, Laws of the Federation of Nigeria, 1990 (applicable in the Southern part of Nigeria) defines rape as unlawful carnal knowledge of a woman or girl by *any person* without her consent, or with her consent, if it was obtained unlawfully, and by Section 6 of the same Code which defines unlawful carnal knowledge as “carnal connection which takes place otherwise than between husband and wife.”

²¹⁹ See Government Gazette No. 36645 of 9 July, 2013; also available free online at www.gpwonline.co.za (9/6/2015).

²²⁰ Section 55A (5).

include advising the Minister for Justice and Constitutional Development on general matters relating to the monitoring and implementation of the Act.²²¹

This Act is comprehensive and offers elaborate protection to the dignity of the woman including girl-child in South Africa, and may arguably be likened to India's Criminal Law (Amendment) Act, 2013 but Nigeria has no such consolidated law for the protection of the sexual dignity of its women or the girl-child.

4.5 Critique of the South African Legislative and Policy Framework and the Way Forward

In spite of South Africa's strong laws for protecting the dignity of women and the girl-child, it has been reported that "some of the few victims who report domestic violence received inadequate support from officials" and "there is evidence that victims reported cases of domestic violence to police or social workers, but their pleas for help fell on deaf ears or (they) were told to resolve the matter with their partners."²²²

With respect to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, Section 15 aims to criminalise acts of sexual penetration by adults with children aged 12 to 16 years, even if they consent while Section 16 criminalises acts of consensual sexual violation committed by adults with children who are up to 12 but below 16 years.

This thesis contends, however, that empowering the prosecuting authority to exercise discretion on whether or not to prosecute violators of the said Sections 15 or 16 of the Act, naturally and logically exposes the Act to the possibility of abuse of the said discretion as a result of party loyalty, socio-political and religious affiliations or other

²²¹ This Committee is crucial to the sustainable implementation and co-ordination of the Act and it shall comprise representatives from the National Prosecuting Authority, the South African Police Services (SAPS), Correctional Services, Social Development, Justice and Constitutional Development as well as the department of Health.

²²² TheWorldPost, 3/8/2013: http://www.huffingtonpost.com/2013/03/08/south-africa-violence-against-women_n_2837804.html (30/4/2015).

“unfair biases and prejudices.”²²³ It is therefore recommended that the Act be reviewed to rather provide for a *mandate* to prosecute.

On the other hand, it is heart-warming that in the Domestic Violence Act, no such discretion to prosecute applies with respect to offences under the Act. Instead, Section 18 of the Act provides that on no account should prosecution be refused or withdrawn in the case of a violator of a woman’s sexual dignity.

However, this thesis generally recommends that, as with India, South Africa can still do more to develop new strategies for enhanced legislative protection of women’s dignity.

4.6 Conclusion

It is without doubt that India leads South Africa and Nigeria²²⁴ in law and policy framework, judicial creativity and activism as well as legislative pro-activity necessary for securing the dignity of women and the girl-child.

This thesis contends, that generally, India’s progress in law and policy for the protection of women’s right to dignity, especially against sexual violations is not even rivalled by the existing law and policy in South Africa albeit, Nigeria lags behind both countries.

And even where law and policy are lacking or deficient, the Supreme Court of India has stepped in with its creativity and activism to bridge inherent gaps and place the law and policy aright, as in the *Vishaka guidelines* before the making of a proper legislation to replace it.

²²³ Mogale, R. S., Burns, K. K., & Richter, S. (2012). Violence Against Women in South Africa Policy Position and Recommendations. *Violence against women*, 18(5), 580-594 at 589.

²²⁴ “Nigerian laws on protection of women’s rights have been criticized for lacking the willingness to promote women’s right as they are inadequate, misinterpreted and unenforceable.” See NI Aniekwu ‘Legalising Cairo: Prospects and Opportunities for Reproductive Rights in Nigeria’ (2006) 1 & 2 CODESRIA Bulletin 49 (quoted in Uju Peace Okeke, “A Case For The Enforcement of Women’s Rights as Human Rights in Nigeria”; **The Women’s UN Report Program & Network (WUNRN)** <http://www.wunrn.com> (16/7/2014)

In Nigeria, there is no national law on domestic violence, only few states have adapted the Child Rights Act, and the CEDAW remains basically lame due to non-domestication. Yet no constitutional, judicial or legislative mandate exists whereby courts may enforce or apply the CEDAW provisions or the Women Protocol to the African Charter by invoking international law.

Furthermore, the Nigerian criminal jurisprudence on rape remains an obsolete common law prototype which has been repealed and replaced with expanded and new legislation in India and South Africa. And unfortunately, the recent last-minute Sexual Offences Bill 2015 passed by the 7th Nigerian Senate in June 2015 fell short of international template because it redefines a child for purpose of unlawful sexual intercourse to mean a person who is eleven years and below whereas for the same purpose, relevant international and regional instruments as well as municipal laws of India and South Africa define a child as a person who is below 18 years of age.

Therefore the totality of advances manifest in the Indian legal framework for the protection the dignity of women and the girl-child are hereby recommended for Nigeria and those other developing countries where the legal rights of women are being eroded and significant work needs to be done to protect existing rights let alone advance them.²²⁵

²²⁵ Asia Pacific Forum on Women, Law and Development (APWLD), Feminist Law and Practice, <http://apwld.org/our-work/feminist-law-and-practice/>. (19/5/2014).

CHAPTER 5

FUNDAMENTAL GAPS IN THE NIGERIAN FRAMEWORK *VIS-A-VIS* LESSONS FROM ADVANCES IN INDIA AND SOUTH AFRICA

5.1 Introduction

A reflection on chapters 3 and 4 of this thesis, that is, the constitutional advances, judicial creativity and activism, as well as legislative and policy framework for the protection of women's right to dignity in Nigeria, India and South Africa reminds one of the many fundamental gaps in the Nigerian framework *vis-à-vis* the many advances in the Indian and South African frameworks.¹

In this chapter therefore, the researcher collates, recapitulates and highlights those gaps with respect to Nigeria's constitutionalism, law and policy as well as judicial attitude. It also highlights the advances, especially on constitutionalism and judicial creativity and activism, with respect to India and South Africa, which may constitute reasonable and valuable lessons for Nigeria.² Although this chapter may seem repetitive, it is quite significant because it provides the platform for easier appreciation of the recommendations suggested in the next chapter for bridging the gaps and reforming the existing Nigerian framework, which may also serve as reasonable and useful template for other developing countries.

This research observes though, that the most striking lessons on the globalization and sustainable protection of women's right to dignity in India arise less from the guarantees

¹ Generally, no constitutional provisions exist in international law. As for South Africa, no known constitutional gaps exist for the protection of the right to dignity of women in its 1996 Constitution because of the formidable provisions of its Bill of Rights which enshrines both the first and second generation of human rights as justiciable positive rights. In India, the major constitutional *lacuna* is the non-justiciability of the directive principles, even though the creativity and activism of the Supreme Court of India make them enforceable and applicable as *implied* fundamental rights. But in Nigeria, many gaps still exist in its 1999 Constitution which defeats the sustainable protection of the right to dignity of women. Gaps also abound in the law and policy framework as well as in the judicial attitude for protecting the right to dignity of women *vis-à-vis* India and South Africa.

² This chapter is like a miniature of this thesis. It substantially recaps chapters three and four of this thesis and connects them with chapter six.

of fundamental rights in its 1950 Constitution and more from its advanced law and policy framework, the creativity and activism of its Supreme Court.

However, in the case of South Africa, the research observes that the core lessons on the globalization of women's right to dignity lie more in the classical Bill of Rights in the South African Constitution as well as the independence and pragmatism of its Constitutional Court than on law and policy.

Suffice to mention, as has been hereunder recommended too, that to bridge the gaps and reform the framework for the protection of women's right to dignity in Nigeria and set the country on the path to a new agenda, Nigeria needs to reasonably combine the lessons (on law and policy as well as judicial creativity and activism from India) with the lessons (on constitutional advances and judicial pragmatism) from South Africa.

5.2 Fundamental Constitutional Gaps in the Nigerian Framework

It has been eloquently and correctly emphasised that:

Although human rights issues have become a global subject with global relevance, States remain primarily responsible in international law for the promotion and protection of human rights. In recognition and acknowledgment of the mandate of States, Nigeria has erected enviable institutional infrastructure and provided a wide range of remedies judicial and extra-judicial – to redress human rights violations occurring in its territory. But the provision of remedies is one thing; their adequacy and efficacy are another matter entirely. It is regrettably true that judicial remedies in Nigeria are hamstrung by a number of factors.³

³ Dada, J. A. (2013). Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal. *Journal of Law, Policy and Globalization* **10**: 1-18 at 1.

Some of these factors are hereunder highlighted.

5.2.1 Non-Justiciability of the Fundamental Objectives and Directive Principles

In Nigeria, the courts insist that by the provisions of Section 6 (6) (c) of the 1999 Constitution, socio-economic rights are negative rights pure and simple, and therefore are not enforceable by judicial adjudication because they are *mere* wishes or aspirations of government, that is, *directive principles*. To the contrary, the South African Constitution, these rights are contained in the Bill of Rights as positive rights and are enforceable as such. In India, though these rights are also prescribed as negative constitutional rights, but by the interpretative creativity and activism of the Indian Supreme Court, they have become transformed into *implied* positive rights and declared to be as justiciable as the right to life and personal liberty in Article 21.

5.2.2 Non-compelling Application of International Law

The Nigerian Constitution 1999 does not oblige courts to follow international law while interpreting fundamental rights in the Constitution. Consequently, important international instruments like the CEDAW, DEVAW and the Women Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa do not have compelling enforcement in Nigeria. This leaves a fundamental gap in the globalization and sustainability of women's right to dignity in Nigeria. It is therefore, most humbly contended that Nigerian judges should "think globally and act locally"⁴ by interpreting and applying the basic principles and guarantees provided in various international human rights instruments to domestic human rights litigations. They should also be creative and active to "abandon their longstanding insularity and inertia

⁴ Udombana, N. J. (2005). Interpreting rights globally: Courts and constitutional rights in emerging democracies. *African Human Rights Law Journal*, 5(1), p. 47-69.

in matters of jurisprudential innovation and borrowing,”⁵ and instead draw upon international and comparative law to assert their institutional authority in the domestic forum.

5.2.3 Limited Right of Access to Justice

In comparison with South Africa and India, the right of access to justice for the enforcement of fundamental rights in Nigeria is limited.

Under Section 46 of the Nigerian Constitution, such access lies only to the High Court of the state where the violation occurred. In whatever circumstance, there is no right of original access to the Supreme Court except on appeal. However, in South Africa, a person has a direct original access to the Constitutional Court (which is the highest court on constitutional matters in South Africa) for the enforcement of his rights contained in the Bill of Rights in the Constitution. Public Interest Litigation is also common in the country.

In India, an aggrieved person may initiate a *Writ* Petition by himself or through Public Interest Litigation at the High Court or the Supreme Court of India. This right of access is further enhanced by the exemplary doctrine of epistolary jurisdiction of courts in India. These are great lessons which Nigeria may apply to expand access jurisdiction and enhance the constitutionality of women’s right to dignity and fundamental rights generally.

⁵ HK Prempeh 'A new jurisprudence for Africa' (1999) 10(3) *Journal of Democracy* 135-146. (Cited in Udombana, N. J. (2005). Interpreting rights globally: Courts and constitutional rights in emerging democracies. *African Human Rights Law Journal*, 5(1), p. 47-69).

5.2.4 Inherent Lapses in the Fundamental Rights (Enforcement Procedure) Rules, 2009

The Fundamental Rights (Enforcement Procedure) Rules, 2009 is fraught with inherent inconsistencies which go to the root of its legality.

Firstly, it extends the jurisdiction to hear fundamental rights applications to ‘the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory, Abuja’ beyond the precise provision of Section 46 (1) of the 1999 Nigerian Constitution which empowers ‘a High court in that State’ to hear such applications. This inconsistency is pertinent in the light of Section 1 of the 1999 Nigerian Constitution which provides that ‘this Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.’⁶ It further states that ‘if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.’⁷

Secondly, certain pertinent provisions of the Rules are contained in the “Preamble” rather than as specific *Order(s)* or *Rules(s)* as is conventional with such Rules. Important issues like *locus standi* and *Public Interest Litigations* are contained in Preamble 1(e) thus:

The Court shall encourage and welcome Public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

⁶ Section 1(1).

⁷ Section 1(3).

- (i) Anyone acting in his own interest;
- (ii) Anyone acting on behalf of another person;
- (iii) Anyone acting as a member of, or in the interest of a group or class of persons;
- (iv) Anyone acting in the public interest, and
- (v) Association acting in the interest of its members or other individuals or groups.

The *lacuna* here is that “the nature of a preamble does not give assurance that the contents have much legal weight.”⁸ In the American case of *Jacobson v Massachusetts*⁹ the court emphasised that the Preamble does not have any legal force, even in the Constitution because it merely introduces the document as a whole and does not, in and of itself, permit the exercise of any legal power whatsoever, and that any power exercisable under the Constitution must emanate from another part of the Constitution but definitely not the preamble.¹⁰

This is without prejudice to paragraph 3(b) of the Preamble to the Fundamental Rights Enforcement Procedure Rules, 2009 which mandates courts to “respect” municipal, regional and international bills of right brought to its attention or of which the court is aware.

This thesis contends that the word “respect” is ambiguous and imposes no definite obligation on courts else, the imperative word “shall” would have been used instead. The statement is therefore a mere persuasion and not a directive or compulsion on Nigerian Courts to apply and enforce international human rights law, a provision which would have equally been void under the non-domestication provision in Section 12 of the Constitution. This thesis holds the view that Nigerian Courts can exhibit activism

⁸ Abiola Sanni “Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples’ Rights in Nigeria: The need for Far-reaching Reform,” 11 Afr. Hum. Rts. L.J. 511 2011, p.524.

⁹ 197 US 11 (1905), cited in Abiola Sanni, *ibid*.

¹⁰ Abiola Sanni, *op. cit* at 528.

and cure this *lacuna* by giving effect to the Preambles of the Rules so that both public interest litigations and international law can be constitutionally enforceable.

Thirdly, the 2009 Rules have failed to eliminate the threat of complexity in the commencement of an action that was the bane of the repealed 1979 Rules. By Order 9(1), the failure to comply with the provision as to place, time, form or manner in an application for the enforcement of fundamental rights shall be considered a mere “irregularity” which may not nullify the proceedings unless ‘it relates to the mode of commencement’ of the application. This is a fundamental affront on access jurisdiction bearing in mind, *inter alia*, that by the doctrine of epistolary jurisdiction in India, a court may even *suo motu*, take cognisance of a media report or ordinary letter as a proper *writ* petition.

Fourthly, there is no right of access to the Supreme Court of Nigeria for the enforcement of fundamental rights, except on appeal, unlike the situation in India and South Africa.

These fundamental gaps justifies the view that “Nigerian laws on protection of women’s rights have been criticized for lacking the willingness to promote women’s right as they are inadequate, misinterpreted and unenforceable.”¹¹

5.2.5 Absence of Specific Constitutional Rights Court

Unlike the Supreme Court of India and the Constitutional Court of South Africa, the Supreme Court of Nigeria is by no means considered or listed as one of the activist tribunals or consequential courts in the Global South. It is also a fundamental *lacuna* in the protection of women’s right to dignity in Nigeria, that while the Indian Supreme

¹¹ N. I. Aniekwu ‘Legalising Cairo: Prospects and Opportunities for Reproductive Rights in Nigeria’ (2006) 1 & 2 CODESRIA Bulletin 49 (quoted in Uju Peace Okeke “*A Case For The Enforcement of Women’s Rights As Human Rights in Nigeria*”; **The Women’s UN Report Program & Network (WUNRN)** <http://www.wunrn.com> (16/7/2014).

Court and the South African Constitutional Court exercise original jurisdiction on matters of fundamental/constitutional rights enforcement, the same cannot be said of the Supreme Court of Nigeria which only exercises appellate powers in like circumstance.

5.2.6 Weak Legal Aid Scheme

Section 46 (4) (b) of the 1999 Nigerian Constitution which deals with legal aid does not enshrine “legal aid” as a justiciable fundamental right. It merely empowers the National Assembly to *make provisions for the rendering of financial assistance* to any indigent citizen *with a view to enabling him* to engage the services of a legal practitioner. The Section therefore imposes no positive obligation of the state to *provide* legal aid but to *render financial assistance with a view to enabling him* provide for himself.

By Section 9 of the Legal Aid Act,¹² only persons whose income do not exceed N1,500 (equivalent of USD 7.5 or MYR 27) per annum shall be granted legal aid. But where the person’s annual income exceeds this amount, Section 9 (2)-(3) of the Legal Aid Act provides that he may obtain legal aid only if he is willing to contribute to the funding. This is certainly another legislative *lacuna* which is part of “the Nigerian factor” and which inhibits the sustainable protection of the right to dignity of women and fundamental rights generally.

Again, the Legal Aid Act¹³ empowers the Legal Aid Council to render legal aid to “needy persons” with respect to charges under the Criminal Code or their equivalent under the Penal Code as well as civil claims in respect of accidents but certainly not with respect to cases for the enforcement of fundamental rights including the right to human dignity.

¹² Legal Aid Act, Cap L9 Laws of the Federation of Nigeria, 2004.

¹³ See second Schedule to the Act.

In India, the right to free legal aid generally applies to *an accused person* in a *criminal trial*, as well as a petitioner seeking justice for the violation of her right to dignity or other fundamental rights under the broad interpretation of Article 21 of the Constitution of India. In the case of *Khatri v. State of Bihar*,¹⁴ the Indian Supreme Court held *inter alia*, that the due process application of Article 39A (the equivalent of Section 46(4)(b) of the Nigerian Constitution) creates a continuing right to legal aid which attaches to the accused person from the time of his first arraignment before a magistrate up till his final appeal at the Supreme Court, and that it also creates an unqualified constitutional obligation on the state to provide the legal aid irrespective of any real or imagined administrative or financial constraints.

It is therefore without doubt that the current legal aid scheme in Nigeria is defective and the Indian example offers a sustainable and realistic example for reform.

5.2.7. Constitutional Limitation of Rights

The limitation of the right to life contained in Section 33(2) (a) (b) (c) of the 1999 Constitution has been cited as ‘one of the greatest impediments to human rights protection in Nigeria,’¹⁵ including of course, the right to dignity of women.

The provision permits the derogation of the right to life if death occurs as a result of the use of force which is reasonably necessary “in such circumstances as are permitted by law,” or in the course of defending “any person from unlawful violence”, or in “defence of property,” or in order to effect a lawful arrest or to prevent the escape of a detainee or “for the purpose of suppressing a riot, insurrection or mutiny.” Consequently, in *Medical and Dental Practitioners Disciplinary Tribunal v. Emewulu*

¹⁴ AIR 1981 SC 928.

¹⁵ See also Dada, J. A. (2012). Impediments to Human Rights Protection in Nigeria. *Ann. Surv. Int'l & Comp. L.*, 18, 67-92 at 77.

& *Anor*¹⁶ the Supreme Court of Nigeria confirmed that all rights and freedoms are subject to limitations of overriding public interest or state policy.

5.2.8 Absence of Constitutional Role for NGOs

In the 1999 Nigerian Constitution, there is no provision for the participation of Human Rights Non-Governmental Organisations (NGOs) and like institutions in monitoring the enforcement or monitoring of human rights, unlike in South Africa where Section 184 (3) of its 1996 Constitution requires relevant state organs to furnish the South African Human Rights Commission (SAHRC) with “information on the measures they have taken towards the realization of the rights in the Bill of Rights.”

In Nigeria, rather than acknowledge human rights NGOs and allied institutions as partners in progress, government sometimes seeks to control them, or otherwise, consider them as “enemy institutions” seeking to run down the existing political *status quo*.¹⁷ In spite of this, some women rights NGOs remain active in Nigeria.

It must however be noted that in India, two celebrated landmark cases which necessitated the *Vishaka Guidelines* and the *Rule in Sheela Barse*¹⁸ and thus revolutionised the legal protection of women’s dignity were based on *writ* petitions filed by public interest litigants.

¹⁶ [2001] 3 S.C.N.J. 106.

¹⁷ For instance, the Executive Secretary of the National Human Rights Commission was unceremoniously removed by government and Human rights NGOs and activists had to impress on government to abide by the Paris Principles of the United Nations which *inter alia*, guaranteed the independence of National Human Rights Commissions. See Ogunniran, I. (2010). Enforceability of Socio-Economic Rights: Seeing Nigeria through the Eyes of Other Jurisdictions. *Unizik Journal of International Law and Jurisprudence*, 1(September 2010), 73-87, at 87.

¹⁸ The crux of the *Vishaka Guidelines* and the *Rule in Sheela Barse* have earlier been discussed in Chapter 4 (4.2.6 and 4.2.7 respectively) of this thesis.

5.3 Fundamental Legislative and Policy Gaps in the Nigerian Framework

5.3.1 Weak Commitment to International and Regional Human Rights Charter

Nigeria has weak commitment to women-specific international human rights instruments. Regrettably, and with particular reference to the CEDAW, Nigeria's permanent representative to the CEDAW committee has authoritatively stated that "Nigeria is notorious for violating international treaties".¹⁹ The non-domestication of the CEDAW by the National Assembly leaves a gap in the legislative framework for protecting women against all forms of discrimination in Nigeria, as much as with the non-domestication of the African Union Protocol to the African Charter on the Rights of Women in Africa (Women's Protocol).

5.3.2 Non-Implementation of the National Gender Policy

The NGP is the core domestic policy instrument for realizing Nigeria's commitments to the equality, empowerment, non-discrimination and elimination of violence against women under national, regional and international policy and treaty instruments, including CEDAW, the African Union Protocol to the Rights of Women in Africa, and the DEVAW. Its goal includes the promotion and protection of women's human rights including their right to dignity and sexual independence.

Yet, arising from a number of socio-political factors, especially the non-domestication of the CEDAW, the NGP which also aims to "reduce gender bias that arises from

¹⁹ Nwankwo, O. (2013). "Nigeria is notorious for violating international agreements." Retrieved 28/3/2015, from Nigerian vanguard Newspaper <http://www.google.com.my/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0CFAQFjAI&url=http%3A%2F%2Fwww.vanguardngr.com%2F2013%2F09%2FNigeria-is-notorious-for-abandoning-international-treaties-oby-nwankwo%2F&ei=R6sVYYwp0uW5BIPogcgO&usg=AFQjCNEkPTepEZDFt6QTb-oQenULvvzbUw&sig2=c7Edl-BLkywEwqV0pmMfWQ&bvm=bv.89381419,d.c2E>. (19/5/2015).

traditional cultural customs” as well as “the abolishment of traditional practices which are harmful to women,”²⁰ can also not be implemented.

5.3.3 Narrow Definition of Rape and Non-Criminalization of Marital Rape

In Nigeria, marital or spousal rape does not fall within the definition of rape properly so called. Section 282(2) of the Nigerian Penal Code (applicable in Northern Nigeria) provides that *sexual intercourse by a man with his own wife is not rape, if she has attained puberty* while Section 6 of the Criminal Code (applicable in Southern Nigeria) states that *unlawful carnal knowledge means carnal connection which takes place otherwise between husband and wife*.

This narrow definition of rape in the Nigeria’s criminal jurisprudence as an unlawful non-consenting sexual act against a woman, but for which her husband cannot be held liable leaves women at the receiving end of spousal rape and allied acts of domestic violence.²¹ This narrow definition has been identified as the main reason why the Nigerian Police often treat cases of intimate partner violence as a “domestic” or “family affair” which should be resolved at home and not by legal justice or police intervention²² Such patriarchal mind-set this is a mild way of empowering men to abuse, violate or rape their wives if need be, even though Intimate Partner Violence (IPV) is considered a terrible, most degrading and devastating form of domestic violence which violates a woman’s dignity which may lead to other breaches of her human rights.²³ However, under most African cultural jurisprudence, a man cannot rape

²⁰ See Japan International Cooperation Agency (JICA) Public Policy Department, (March 2011). Country Gender Profile Nigeria: Final Report (pp. 10-13), especially the Summary at pp. iv-v. http://www.jica.go.jp/english/our_work/thematic_issues/gender/background/pdf/e10nig.pdf (14/5/2015).

²¹ Reports abound of many battered women have said that their husbands demanded sex directly following a beating, regardless of the wife’s wishes or emotional or physical state. When a woman consents to sex out of fear or coercion, it is rape, and the perpetrator should not be allowed to get away with the offence by the mere fact that he is married to the survivor/; see Center for Research on Partner Violence. www.wellesley.edu

²² Ozo-Eson, P. I. (2008). "Law, Women and Health in Nigeria." *Journal of International Women’s Studies* 9(3), p.295.

²³ Ambily, P. (2014). Evaluating the Criminal Justice Interventions for ‘Intimate Partner Violence’ in India: The Need for a Paradigm Shift. *SPCERA International Journal of Law and Governance*, (SPCERA IJLG), 3(6), 32-42. doi: <http://spcera.in/pdf/4Amly-Criminal%20-justice%20and%20interventions-%20Ambily.pdf>

his wife because the sexual satisfaction of the man is considered a permanent and unquestionable obligation of the woman.

5.3.4 Onerous Burden of Proof of Sexual Offenses

Section 221 of the Nigerian Criminal Code is on the defilement of girls below 16 years. It stipulates that a person cannot be convicted upon the uncorroborated testimony of one witness, of the offence of unlawful carnal knowledge of a girl who is above thirteen years but below sixteen; or of attempt or unlawful carnal knowledge of a girl or woman who is an imbecile, idiot or like disability. This is a laughable patriarchal provision which is manifestly anti-women and calls for immediate reform. According to one writer, *'interestingly, sexual predators don't invite people to come and watch their crime. How can this offense be proved then?'*²⁴

It must be mentioned that some Nigerian judges differ on this issue of corroboration. In a 1951 judgment, Adetokunbo Ademola, J. (as he then was) stated the position of the law in Nigeria thus: "it is not a rule of law in Nigeria that in sexual offences offenses accused person should not be convicted on the uncorroborated evidence of a prosecutrix, that the court may after paying attention to the warning nevertheless convict if they are satisfied of the truth."²⁵ Later in the 1965 case of *Ukut v. State*,²⁶ the court held that in sexual offences including rape, the judge should beware of convicting an accused without corroboration. Yet in the 1968 case of *State v. Ogiondiegion*²⁷ the court stated that the requirement of corroboration of evidence of the prosecutrix is not required but that the judge must warn himself on the risk of convicting of such evidence alone.

²⁴See "How Nigeria legalizes discrimination against women", By Aminu Hassan Gamawa, Premium Times Newspaper Online of 28 July, 2013. <http://www.premiumtimesng.com/opinion/141797-how-nigeria-legalizes-discrimination-against-women-by-aminu-hassan-gamawa.html> (26/5/2015).

²⁵ *Simon v. Police* (1951) WLNLR 23

²⁶ (1965) 1 NRNLR 306

²⁷ (1968) 1 NMLR 117

5.3.5 Justification of Wife ‘beating’ under the Penal Code

Section 55 (1) (d) of Nigeria’s Penal Code²⁸ (applicable to Northern Nigeria) permits a husband to beat his wife, if that is what it will take to correct her mistakes.

The said Section provides thus:

Section 55: Correction of Child, Pupil, Servant or Wife

(1) Nothing is an offence which does not amount to the infliction of grievous hurt upon any persons which is done:

- (a) by a parent or guardian for the purpose of correcting his child or ward.
- (b) by a schoolmaster for the purpose of correcting a child.
- (c) by a master for the purpose of correcting his servant or apprentice.
- (d) by a husband for the purpose of correcting his wife, such husband and wife being subject to any native law or custom in which such correction is recognized as lawful.

Suffice to say that an assault by a man on a woman is not an offense if they are married, if native law or custom recognizes such “correction” as lawful, and if there is no grievous hurt.²⁹ This is a manifest endorsement of violation of a wife’s right to dignity especially in a patriarchal country where there is no national legislation on domestic violence, where international instruments like CEDAW and the African Women Protocol are not neither domesticated nor enforceable and where also, the National Gender Policy is not implementable, albeit it seeks *inter alia*, to eliminate cultural/ religions gender-based biases as well as other harmful religious and socio-cultural practices which rise to inequalities in gender-role relations in the Nigerian society.³⁰

The title, “Correction of Child, Pupil, Servant or Wife” in Section 55 of the Nigerian Penal Code, is humiliating enough because it does not recognize the wife’s right to dignity or equality but rather places her at par with children, pupils and servants.

²⁸ Cap 89 Laws of Northern Nigeria 1963.

²⁹ EQUALITY NOW: http://www.equalitynow.org/the_penal_code_of_northern_nigeria (26/5/2015).

³⁰ The Nigeria CEDAW NGO Coalition report (2008).

5.3.6 Denial of Women's Right to Inheritance under Customary Law

Nigerian wives and daughters do not have a right of inheritance to the estate of their deceased husbands and fathers under customary law, especially in South East Nigeria. In Yoruba-land, South West Nigeria, wives have no right of inheritance to their deceased husbands' estate but daughters do inherit equally with their brothers.³¹

In Islamic law, wives and daughter can inherit even though the daughters inherit only half of what is due to the sons.³²

5.3.7 Absence of National Legislation on Domestic Violence

Reports show that one third of Nigerian women have been victims of at least one form domestic violence including verbal abuse, battering, marital rape or psychological and emotional abuse.³³ Anyogu, and Arinze-Umobi³⁴ rightly described 'domestic violence' as "a luxuriating iniquity against the Nigerian women." Flagrant indignity, disrespect and disregard for women's human rights in Nigeria are often fuelled by society's blind acceptance of certain cultural practices which dehumanize, humiliate and constitute or condone violence against women.

Despite the staggering reality of acts of violence against women in Nigeria, available data on the subject is 'notoriously' unreliable and regrettably, there is still no national legislation against this vice in Nigeria as repeated attempts aimed at criminalizing acts which constitute domestic violence against women have proved abortive.³⁵

³¹ F. Anyogu, **Access to Justice in Nigeria; A gender Perspective** Enugu, Ebenezer Productions Nigeria Ltd 2009 p.319.

³² Anyogu, F., & Arinze-Umobi, C. (2011). The Globalized World and Gender Rights in Nigeria: The Gains, the Losses. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 2 at 152.

³³ UNDP Nigeria/UN Gender Theme Group Nigeria (2013) Gender Briefing Kit, p. 24, http://www.ng.undp.org/content/dam/nigeria/docs/IclusiveGrwth/UNDP_NG_inclusiveGrwth_Gender-Briefing-Kit230513.pdf (15/5/2015).

³⁴ *Op.cit.*

³⁵ UNDP Nigeria/UN Gender Theme Group Nigeria (2013) Gender Briefing Kit, p. 24, op. cit.

5.3.8 Contradictory Definition of “a Child” in the New Sexual Offences Bill, 2015

On Wednesday 3 June 2015, only three days to the end of its four year legislative life, the 7th Senate of the Federal Republic of Nigeria passed 46 Bills in 10 minutes including the Sexual Offences Bill (SB. 279). Media reports tell that these bills have been pending four years.³⁶ One of the most remarkable features of the Bill is that it prescribes life imprisonment for rapists and those who “have sexual intercourse with children below 11 years of age.”

This provision of “sexual intercourse with children below 11 years,” invariably means that the Act has redefined the minimum the legal age of “a child” in Nigeria to 11 years. Consequently, the new Bill clearly varies with and contradicts the definition of a child under the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the Child Rights Act, 2003 all of which define a child as a person below 18 years of age. This is a calamitous *lacuna* in the document and we wait to see the ultimate fate of the Bill since it has neither been passed by the Federal House of Representatives nor signed into law by the President of Nigeria.

5.4 Fundamental Judicial Gaps in the Nigerian Framework

In the words of Justice Chukwudifu Oputa, “All citizens of our country have a right to have their substantive legal and Constitutional rights recognized and transformed into actual judicial remedies without which their theoretical constitutional fundamental rights would be seriously diminished or else denuded of any real value.”³⁷

5.4.1 Judicial Attitude to *Locus Standi* and *Stare Decisis*

Nigerian courts still exhibit and apply a conservative and narrow definition and approach to *locus standi* and *stare decisis*, especially in matters relating to the

³⁶ The Guardian Newspaper Online, 4 June 2015. <http://www.nguardiannews.com/2015/06/senate-dumps-own-rules-passes-46-bills-in-10-mins/> (5/6/2015).

³⁷ C. A. Oputa, *Human Rights in the Political and Legal Culture of Nigeria*, Lagos Nigerian Law publications, 1989 at 73.

enforcement of fundamental rights. It is with respect to such cases that Udombana posited that African judges should devote themselves towards the end of justice “rather than being defenders of the *status quo*” especially now that dictatorships and authoritarian regimes are being replaced by popular regimes thereby affording the “golden opportunities to develop constitutionalism, by enforcing limitations on the exercise of governmental power, exercising their powers of judicial review to advance and deepen the transition to constitutional democracy, and, above all, protecting human rights through comparative constitutionalism.”³⁸

It is therefore a judicial *lacuna* that most Nigerian courts are yet to “think globally” by consistently interpreting and applying crucial doctrines like *locus standi* and *stare decisis* in such manner as would defeat the ultimate essence of the law, which is the welfare of society.³⁹

This *lacuna* becomes more pressing when one realises that lower courts are meant to follow the decisions of higher courts when faced with similar facts. For instance, the current situation in Nigeria is that both the narrow approach to *locus standi* (*Adesanya v. The President of the Federal Republic of Nigeria*⁴⁰ and *Olawoyin v. Attorney-General of Northern Nigeria*⁴¹) exists and applies alongside the liberal approach (*Fawehinmi v. Akilu & Anor.*⁴²) thereby creating inconsistent and conflicting “*locus classicus*” on the same subject. This gives the lower courts the discretion to pick and choose the desirable *stare decisis*, thereby threatening the sustainable enforcement of women’s right to dignity.

³⁸ Udombana, N. J. (2005). Interpreting rights globally: Courts and constitutional rights in emerging democracies. *African Human Rights Law Journal*, 5(1), p. 47-69, at 68.

³⁹ *Ibid* at 55.

⁴⁰ (1981) All NLR 1 SC

⁴¹ (1961) 2 SCNLR 5. This restrictive application of *locus standi* has been followed in several other cases including *Thomas v. Olufosoye* (1986) 1 NWLR Part 18, p.669 SC; *Chuba Egolum v. Olusegun Obasanjo* (1999) 7 NWLR Part 611, p. 355; *Keyamo v. Lagos State House of Assembly* (2000) 12 NWLR Part 680, p.196 CA; *Fawehinmi v. Inspector General of Police* (2002) 7 NWLR Part 767, p.606 SC. But this is not so with the application of Public Interest Litigation/Class Action Litigations in South Africa and India as well as the doctrine of epistolary jurisdiction of courts in India.

⁴² (1987) 1 NWLR Part 67, p.797 SC.

5.4.2 Attitude to the Non-Judicialization of Socio-Economic Rights

The apparent lack of courage and activism by Nigeria courts, unlike their Indian counterparts, to judicialize socio-economic rights, despite constitutional non-justiciability of same under Section 6(6) (c) of the 1999 Nigerian Constitution, remains a challenge to the protection of women's right to dignity and fundamental rights generally, in the country "Non-justiciability" of socio-economic rights is a *lacuna* in the Constitution of the Federal Republic of Nigeria, 1999 while "non-judicialization" refers to the inability of Courts to assume jurisdiction in the justiciability of those rights.⁴³

5.5 Advances in the Legal Framework for the Protection of the Right to Dignity of Women in India and South Africa: Lessons for Nigeria

5.5.1 Lessons from the Advances in India

The Supreme Court of India is arguably one of the most powerful Constitutional Courts in the world because it plays an active and decisive role in the socio-political governance of the polity, and in some cases has virtually taken over functions that were ordinarily reserved for the Parliament and the Executive.⁴⁴

The interplay of constitutional guarantees, judicial attitude and activism in the protection of women's right to dignity, equality and freedom from violations in India, is manifest in specific areas including: broad definition of the right to life and personal liberty in Article 21, elaborate definition of bonded labour, inclusive interpretation and *implied* application of the Directive Principles of State Policy; the "Due Process" Rule

⁴³ This thesis has discussed the non-justiciability of socio-economic rights in the Nigerian Constitution, 1999 in 5.2.1 above. The instant discussion however, is with respect to the inability or failure of Nigerian Courts, unlike the Indian Courts, to exhibit creativity and activism to circumvent the constitutional provision on non-justiciability. In the South African Constitution, these rights are justiciable positive rights in the Bill of Rights. But under the Indian Constitution which share the character of non-justiciability with Nigeria, the courts have applied their courage and activism to judicialize these rights and make them as justiciable as the fundamental rights.

⁴⁴ Manoj Mate, "Public Interest Litigation and the Transformation of the Supreme Court of India" in Chapter 10, Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan (ed.) *Consequential Courts: Judicial Roles in Global Perspective*, 2013 Cambridge University Press, USA., p.262.

of *Just, Reasonable and Fair* interpretation of fundamental rights in the Constitution; new concept of Legal Aid; Public Interest Litigations (PIL)/ Class Action Litigations (CAL); the *Epistolary Jurisdiction* dictum; the *Vishaka Guidelines* against Sexual Harassment at Workplace, the Rule in *Sheela Barse* for the protection of the dignity of women in custody and the introduction of a special “Social Justice Bench” at the Supreme Court for hearing matters relating to women and children.

Emphatically, India’s advance in the protection of women’s right to dignity lie more in the independence, innovations and interpretative activism of the Indian judiciary, especially the likes of Justice J. S. Verma, Justice Krishna and Justice P.N. Bhagwati (former Chief Justice of India). Thus, even where legislation are weak or non-existent on a subject of women’s dignity, the Supreme Court has been proactive enough to *make* binding judicial guidelines pending the enactment of legislation.⁴⁵

On this note therefore, Nigeria stands to learn many important lessons on Constitutional guarantees, judicial creativity and activism, among others, for the protection of women’s right to dignity from India. Some of these lessons are hereunder discussed:

5.5.1.1 Judicial Creativity and Activism in the Interpretation of Constitutional Rights

One of the foremost lessons which Nigeria stands to learn from India is in the latitudinal interpretation of constitutional provisions on fundamental rights which makes it possible to give the broadest, most protective and accommodating (direct and implied) definitions in order to secure those rights. Some of these include the following:

⁴⁵ See *Vishaka v. State of Rajasthan* (*supra*) and *Sheela Barse v. State of Maharashtra* (*supra*). See also Maja Daruwala (ed). (2005) “Human Rights and Policing: Landmark Supreme Court Directives and National Human Rights Commission Guidelines.” CHRI, New Delhi, Biennial Report on Human Rights Issues to the Commonwealth Heads of Government Meet, CHOGM) p. 20-21. http://www.humanrightsinitiative.org/publications/hrc/humanrights_policing.pdf.

(a) Broad Interpretation of the Right to Life in Article 21

The Constitution of India guarantees women's right to dignity, equality before the law, freedom from discrimination and the right to life and personal liberty.

By Article 14, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 15 prohibits discrimination on many grounds including caste and sex while Article 19 guarantees the right to equality before the law and equal protection of the law. The omnibus Article 21 provides that **"No person shall be deprived of his life or personal liberty except according to procedure established by law."**⁴⁶

In *Maneka Gandhi v. Union of India*,⁴⁷ Bhagwati, J (as he then was) interpreted the phrase, *procedure established by law* in Article 21 to mean a procedure which is *reasonable, fair and just*, (and not arbitrary, fanciful or oppressive) and that the expression *personal liberty* is of the "widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man." Accordingly, any law seeking to interfere with personal liberty must satisfy three conditions: First, it must prescribe a procedure. Second, the procedure must not be in violation of such rights as freedom of speech, religious worship, association, peaceful assembly and movement conferred by Article 19 and thirdly, it must not derogate from the right to equality and equal protection of the law in Article 14, else it would be a null procedure within the meaning of Article 21.⁴⁸

The Supreme Court has also emphasised that the guarantee of right to life in Article 21 is not limited to physical existence or to the use of any faculty or limbs but also includes the right to live with basic human dignity and "all the bare necessities of life" and that

⁴⁶ Bold for emphasis

⁴⁷ (1978) 1 SCC 248.

⁴⁸ Also in *Bandhua Mukti Morcha v. Union of India*, AIR 1984 802, the Supreme Court described Article 21 as the heart or nucleus of the fundamental rights, that is, "[T]he minimum conditions which must exist in order to enable a person to live with human dignity."

no procedure can ever be regarded as reasonable, fair and just which seeks to deprive them.⁴⁹

This presupposes that the cultural exploitation and violation of a woman's dignity (including marital rape) ceases to be a domestic or *family affair* because the right to dignity is as sacrosanct as the right to life in India.⁵⁰ By innovative judicial interpretation, the word "person" used in Article 21 has even been applied to protect the dignity of foreign women in India. Thus, in *Chairman, Railway Board v. Mr. Chandrama Das*,⁵¹ the Supreme Court upheld the verdict of the Kolkata High Court that a Bangladeshi woman gang-raped by some railway workers in India was entitled to damages for the gross violation of her right to life protected by Article 21.

To further underscore the essence of *dignity*, the Indian Supreme Court queried itself thus: "If dignity or honour vanishes what remains of life?"⁵²

This thesis humbly contends that defining the right to dignity as an addendum to Article 21 and the fine-tuning the non-justiciability proviso in Article 37 to make the inchoate rights listed in the directive principles of state policy enforceable by *implication* offer good reasons why the Indian judicial approach is hereby recommended for other ASEAN and developing countries where protections may be weak.

(b) The *Just, Reasonable and Fair* Interpretation of "State" and "Bonded Labour."

To further protect women's right to dignity, among others, Justice Bhagwati's rule of just, reasonable and fair interpretation of fundamental rights and directive principles of state policy also earned liberal interpretation for such concepts as "state" and "bonded labour."

⁴⁹ *Frances Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors*, AIR 1981 SC 746.

⁵⁰ In *State of Punjab v. Ramdev Singh* AIR 2004 SC 1290, the Supreme Court observed that rape, marital or otherwise, was a gross violation of the right to life was therefore to be dealt with decisively and sternly. See also *Shri Bodhisattwa Guatam v. Ms. Subhra Chakraborty* AIR 1996 SC 922; 1996 1 SCC 490 where the Supreme Court held that that women have a right to liberty and a right to be respected, lead an honourable and peaceful life and be treated as equal citizens, and that rape is a crime against society and not the woman-victim *per se*, even though it destroys her own personal psychology and deep emotions.

⁵¹ *Chairman, Railway Board v. Mr. Chandrama Das*, AIR 2000 988.

⁵² *Khedat Majdoor Chetna Sanghat v. State of M.P.* (1994) 6 SCC 260: AIR 1995 SC 31

According to Khan, bonded labour is synonymous with modern day slavery, and exists in several aliases including unlawful compulsory labour, begar, forced labour or traffic in human beings. He described it as a form of forced labour whereby a person is compelled to work without remuneration or for grossly inadequate remuneration, or where a person is bound to serve his master for an unreasonably low wage for a fixed or indefinite term or by an agreement for extra work which is prejudicial to the worker, or when a custom requires householders in a village to offer free labour to the village head.⁵³

By whatever nomenclature, all forms of forced/bonded labour violate the right to life and are thus, prohibited by Article 23(1) of the Indian Constitution as a blanket protection for the dignity of women against every exploitative labour and trafficking for sexual or other illicit purposes.⁵⁴

This broad definition of forced/bonded was applied to redress the indignity of women working in exploitative and demeaning conditions in Tamil Nadu garment factories.⁵⁵ The Court also defined “state” to include all agents of state including administrative officers, ministers and even police officers. This is to ensure that government is held vicariously liable for any breach of a woman’s right to dignity by public officers including the police. This activist definition is also common with the South African judiciary.⁵⁶

⁵³ S.L.A. Khan *op.cit* Chapter 6, p. 96-97.

⁵⁴ Peoples’ Union for Democratic Rights v. Union of India, AIR 1982 1473; (1982) 3 SCC 235.

⁵⁵ “Maid in India: Young Dalit Women Continue to Suffer Exploitative Conditions in India’s Garment Industry,” April 2012 Joint report of findings on the labour conditions in the South Indian garment and textile industry. http://somo.nl/publications-en/Publication_3783. (14/4/2013); See also the earlier report, ‘Captured by Cotton – Exploited Dalit Girls Produce Garments in India for European and US Markets’, Amsterdam, the Netherlands, May 2011, http://somo.nl/publications-en/Publication_3673, (14/4/2013).

⁵⁶ See The “F” Case: F (Applicant) v Minister of Safety and Security & 5Ors, CCT 30/11 [2011] ZACC 37 and Carmichele v. The Minister of Safety and Security & The Minister of Justice and Constitutional Development CCT48/00 [2001] (4) SA938 (CC)

(c) Inclusive Interpretation and *Implied* Justiciability of the Directive Principles of State Policy

Part IV (Articles 36 to 51) of the Constitution of India contains the directive principles of state policy which Article 37 declares non-justiciable thus:

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

The directive principles in Articles 46, 51 (c) and 51A (e) are remarkable. Article 46 provides for the promotion of education and economic interests of vulnerable persons as well as protection against social injustice and all forms of exploitation. Article 51 (c) enjoins the state to foster respect for international law and treaty obligations in relation to its people while Article 51(A) (e) specifically oblige every citizen of India to “renounce practices derogatory to the dignity of women.”⁵⁷

In his article, “*Article 21 of the Constitution of India*,” Justice N.K Jain⁵⁸ noted that Article 21 has nearly become a residuary right under which many of the non-justiciable directive principles are implied and enforced as fundamental rights to such extent that it not only casts a negative duty upon the State not to interfere with life and liberty of individuals but also imposes a positive obligation on the State to ensure that people enjoy these rights with dignity. This judicial ingenuity constitutes the bedrock for the promotion and protection of women’s right to dignity and fundamental freedoms in

⁵⁷ The Supreme Court relied *inter alia*, on Section 51A (a) and (e) in giving the judgement leading to the formulation of the *Vishaka Guidelines*.

⁵⁸ Justice N.K Jain (2006), “*Article 21 of the Constitution of India*,” Legal literacy & Awareness Series 7 5/2006 <http://rshrc.nic.in/07%20Human%20Right%20Article-21.pdf> p.5 (28/10/2013).

India and creates new models for the fulfilment of the constitutional aspirations of other vulnerable persons⁵⁹ thus leaving the Indian society indebted to their Apex court.⁶⁰

5.5.1.2 Judicial Creativity and Activism in *Making* Quasi-Legislation: Formulating Guidelines and Issuing General Directions for the Protection of the Sexual Dignity of Women

Generally, and by the obvious democratic principles of separation of powers, it is the function of the legislature to *make* laws and that of the judiciary to *interpret* the law. Article 32 of the Constitution of India empowers the Supreme Court to grant relief to an aggrieved applicant on the infringement of her fundamental right while Article 142 empowers the Court to make such order “as is necessary for doing complete justice in any cause or matter pending before it.” Ostensibly, this does not impose upon the Supreme Court a legislative power to *make laws*.

However, in two prominent cases, and consequent upon its legendary creativity and activism, the Supreme Court of India had interpreted and invoked these provisions “for a much wider purpose”⁶¹ by making quasi legislation and issuing general guidelines which had the effect of law and applied as such in the absence of “proper” law made by the legislature.

Firstly, in *Vishaka & Ors v. State of Rajasthan*,⁶² a female social worker was gang raped at her workplace in Rajasthan, at a time when such rapes were becoming commonplace in India and there was no criminal legislation on the subject. However, while the criminal trial was pending in court, certain social activists and NGOs filed a *writ* Petition as class action litigation under Article 32 of the Indian Constitution, to gain

⁵⁹ Bhagwati, P N (1987), ‘Social Action Litigation: The Indian Experience’, in Trivetelram and Coomaraswamy (eds.), *The Judiciary in Plural Societies*, p.20.

⁶⁰ Justice N.K. Jain, *ibid* at 25.

⁶¹ Jain, M. P. (2003). INDIAN CONSTITUTIONAL LAW (WITH CONSTITUTIONAL DOCUMENTS). New Delhi, India, Wadhwa & Company Nagpur, pp. 1549-1551. The *Vishaka guidelines* have now been promulgated into “The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act and Rules 2013.

⁶² JT 1997 (7) SC 384; AIR 1997 SC 3011.

public condemnation of the menace and obtain appropriate remedy through judicial process for the enforcement of the fundamental rights of working women.⁶³

Although there was no criminal legislation on the subject, the Supreme Court of India, popular for its independence, creativity and activism, held that even though it is not the constitutional role of the judiciary to make laws, nonetheless, that it was the consequential obligation of the Supreme Court to undertake the social function as *law giver*, when there is no law. Accordingly, the court formulated the *Vishaka guidelines* which applied as “the binding legislation” for the protection of women against sexual violation at their workplaces pending the making of a proper “legislative” law on the subject.⁶⁴ The Court observed that where there is no legislation, it is the duty of the executive to fill the vacuum by executive orders but that where they fail to act, the judiciary would be constitutionally bound to step in to rescue the situation pending the enactment of proper legislation.

Realising that positivists would accuse the court of having usurped the constitutional *law making* powers of the legislature, the Supreme Court explained that it drew inherent powers from two provisions of the CEDAW namely Article 11 which enjoin State Parties to take all appropriate steps to ensure equality at work, safe working conditions and eliminate discrimination against women in the workplace and Article 24 which enjoin State Parties to apply all necessary measures at the national level to ensure the full realization of the rights recognised in the CEDAW.

The court further stated that:

Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right...
International Conventions and norms are, therefore, of great significance in

⁶³ Their petition hinged on Articles 14 [right to gender equality], 19(1) (g) [right to practise any profession, or to carry on any occupation, trade or business] and 21 [right to life and personal liberty] of the Constitution.

⁶⁴ The Vishaka guidelines have now been replaced by the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2013, which was signed into law by the Indian president on April 22, 2013.

the formulation of the guidelines to achieve this purpose. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed [accordingly].

This is an ingenious and commendable judicial way to fill a legislative *lacuna* in municipal law, and thus represents a reasonable lesson for Nigeria, where the Supreme Court insists that international human rights instrument like the CEDAW cannot be enforced in Nigeria unless domesticated into municipal law under Section 12 of the Nigerian Constitution.

Secondly, and as explained earlier in Chapter 4 (4.3.7) of this thesis, the Supreme Court of India, in the celebrated *Sheela Barse v. Union of India*,⁶⁵ also manifested its innovativeness, creativity and activism, when it formulated guidelines, based on a class action litigation filed to protect the sexual rights and dignity of women in custody and various police lock-ups and detention centres in India,⁶⁶ at a time when no legislation existed on the subject. Those guidelines or Directives became known as the *Rule in Sheela Barse*. Details of these Rules are elaborated in Chapter 4 (4.3.7) of this thesis, however, they generally provide “legisprudential” jurisprudence for ensuring the protection of the dignity, physical safety, sexual safety and privacy of women and girls held in custody. It also directed that female judicial officers should regularly supervise compliance with these Rules. The Rules also permit courts to order that rehabilitation or other special assistance be provided to female inmates in appropriate cases.

⁶⁵ AIR 1987 (1) 153.

⁶⁶ *Ram Kumar v. S H Pradesh* AIR 1995 SC 1995; *P Rathinam v. S of Gujarat* (1993) 2 Scale 631.

Roznai describes this ingenious exercise of legislative “law-making” function by courts as *Legisprudence*.⁶⁷ This thesis submits therefore, that these rules, if applied strictly and reasonably in Nigeria, will bridge any existing *lacuna* with respect to the right to dignity of women in police lock-up and the prisons.

5.5.1.3 Innovation in the Right of Access to Justice for *Writ* Petitions

With regards to free access to justice for the enforcement of fundamental rights, Nigeria stands to learn many valuable lessons from India’s broad and liberal access to justice for the enforcement of fundamental rights petitions (known as *writ* petitions in India). Some of these concepts include:

(a) Public Interest Litigation (PIL)⁶⁸

The Indian Constitution confers jurisdiction to hear and enforce petitions on fundamental rights brought directly before the Supreme Court *vide* Article 32 and the state High Courts *vide* Article 226. Ordinarily, such petition must derive from a breach or a threat to breach the petitioner’s *own rights* guaranteed in the Constitution which establishes *his own* sufficient legal capacity under the doctrine of *locus standi*. This is the elementary and archaic recognition of *private interest litigation*,⁶⁹ which precludes one from lawfully litigating the breach or threat to breach the constitutional right of another. This rule however, does not apply to an application for *Quo warranto* or *habeas corpus*⁷⁰.

⁶⁷ Roznai, Y. (2014). *Legisprudence Limitations on Constitutional Amendments? Reflections on The Czech Constitutional Court’s Declaration of Unconstitutional Constitutional Act (April 10, 2014)*, 8(1), 29-57.

⁶⁸ Also to be read and understood in the same manner as *Class Interest Litigation* (or *Class action Litigation*) when the *writ* petition or letter is instituted on behalf of a given class or group of persons, as were seen in the Supreme Court cases leading to the *Vishaka Guidelines* and the *Rule in Sheela Barse*.

⁶⁹ In *Janatan Dal v. H.S. Chowdhry* [AIR 1993 SC 392] the Supreme Court differentiating Private interest Litigation from Public Interest Litigation thus: “In a private action, the litigation is bipolar: two opposed parties are locked in a confrontational controversy which pertains to the determination of the legal consequences of past events unlike in public action. In contrast, the strict rule of *locus standi* applicable to private litigation is relaxed in public interest litigation (PIL) and a broad rule is evolved which gives the right of *locus standi* to any member of the public acting *bona fide*... the dominant object of PIL is to ensure observance of the provisions of the Constitution or the cause of community or disadvantaged groups and individuals or public interest...”

⁷⁰ *Habeas corpus* means “produce body” and naturally, it can only be applied by one on behalf of the prisoner.

The introduction and development of public interest litigation (PIL)/class action litigation (CAL) as the strategic arm of the legal aid movement in India fine-tuned *locus standi* such that “any member of the public or social action group acting bona fide” can invoke the Writ Jurisdiction of the High Courts or the Supreme Court seeking to redress the violation of the legal or constitutional rights of other persons who cannot approach the court by themselves due to social, economic or other disability.⁷¹ PIL thus became a potent weapon for the enforcement of “public duties” by third parties in all cases where the interests of general public or a section of the public are at stake. This innovation thus institutionalized access to justice as well as judicial remedies, as *sine quo non* for the protection of women’s right to dignity in India.⁷²

Chinese scholar, Li Li,⁷³ acknowledges that the level of judicial activism common in India is rare in Asia.⁷⁴ This thesis hereby recommends this unique activism to other countries in Asia and beyond.

(b) The Dictum of Epistolary Jurisdiction of Courts

The epistolary jurisdiction dictum is the judicial over-stretch of public interest litigation.⁷⁵ It is a liberalized mode of access to justice formulated by the Indian Supreme Court under Justice Bhagwati to ease the process by which a litigant third party, indigent or not, may institute action for the breach of his or other person’s fundamental right.

The Epistolary jurisdiction dictum is an access jurisprudence whereby a mere personal letter addressed to a judge personally or to a court in India is received, treated and heard as a formal and proper writ petition as was the case in *Mrs. Veena Sethi v. State of Bihar*

⁷¹ *S.P. Gupta v. Union of India*, AIR 1982 SC 149, Per Justice Bhagwati.

⁷² Khan *op.cit* at 179, expressed the opinion that with public interest litigation, “...the large masses of people belonging to the deprived and exploited sections of humanity [including women] may be able to realize and enjoy socio-economic rights granted to them and these rights may become meaningful for them instead of remaining mere empty hopes.”

⁷³ Li Li (2013) “Judicial Strategies in Chinese Group Action Cases: A Realistic Reaction to Judicialisation” *Hong Kong Journal of Law*, HKJL, Vol. 43 Part 1 of 2013 P. 317-348 at 317.

⁷⁴ See also Guobin Zhu (2013) “Weak Courts, Weak Rights: Assessing the Realisation of Constitutional Rights in PRC Courts” *Hong Kong Journal of Law*, HKJL, Vol. 43, Part 2 of 2013, Pg 713-744 at 713.

⁷⁵ The Encarta Dictionary defines *Epistolary* as “associated with correspondence by letter” and “in the form of a letter or letters.”

& Ors⁷⁶ where personal letters written to Justice Bhagwati by an NGO were *suo motu* accepted as *writ* petitions for the enforcement of constitutional rights of certain detained prisoners.

This protection also avail women for breach of their right to dignity⁷⁷ and was more recently, in the case of “*In Re: Indian Woman Says gang raped on orders of village court published in Business & Financial News dated 23.01.2014*”⁷⁸ where the Indian Supreme Court, on January 24, 2014 took *suo motu* notice of the media outrage following a report that 13 men in West Bengal, gang-raped a 20-year old tribal woman on the orders of village elders, as punishment for having a relationship with a man from a different caste. The Supreme Court later in its judgement, per Chief Justice P. Sathasivam, ordered the West Bengal Government to pay exemplary financial compensation to the rape survivor for its failure to adequately protect her “fundamental rights.”

This thesis considers the epistolary jurisdiction dictum as one of the most advanced and liberal forms of access jurisdiction in the world and justifies the assertion that the Indian legal framework for the protection of women’s dignity is “by no means less than those of other activist judicial systems in other parts of the world.”⁷⁹ This is therefore a most valuable lesson for Nigeria.

(c) The Doctrine of *Curative Petition* Further to Article 137 of the Constitution

Generally, in most world jurisdictions, the judgement of the Supreme Court (or by whatever nomenclature the highest court in the land is described) is final and not subject to review. In India Article 137 of the Constitution empowers the Supreme Court “to review any judgment pronounced or order made by it.” Ordinarily, beyond this point, there should be no further appeal or review.

⁷⁶ AIR 1983 SC 339. The Order of this Court is also available at <http://www.indiankanoon.org/doc/1928844/> (8/11/2013).

⁷⁷ See *Keshavananda Bharati v. State of Kerala* AIR 1973 SC 1461.

⁷⁸ *Suo Motu Writ Petition (Criminal)* No. 24 of 2014, [Decided 28 March, 2014].

⁷⁹ *Janatan Dal v H.S. Chowdry*, AIR 1993 SC 892

By judicial creativity and activism, the Supreme Court of India developed the *Doctrine of Curative Petition* whereby the final judgement of the Supreme Court can yet be appealed against, having first been reviewed under Article 137. This doctrine allows a *second* review. By the doctrine, an aggrieved applicant of a miscarriage of justice may appeal to the Supreme Court against itself. Thus, in the far-reaching consequential Indian case of *Rupa Ashok Hurra v. Ashok Hurra*⁸⁰, a five- judge Constitution bench of the Supreme Court held unanimously that in order to rectify gross miscarriage of justice in its final judgement which cannot be challenged, the court will allow *curative petition* by the victim of miscarriage of justice to seek a second review of the final order of the Court. The Court further observed that “though the judges of the highest court do their best subject to the limitation of human fallibility yet situations may arise, in the rarest of rare cases, which would require reconsideration of a final judgement to set right miscarriage of justice.”

The court also affirmed that in such circumstance, it would be morally and legally bound to rectify error in such a decision that otherwise would remain in the cloud of uncertainty. This judgement put to rest the oft vexed issue of how or whether a petitioner could question a final judgement even after the dismissal of the review petition.

The researcher opines that in formulating the doctrine of curative petition, the Indian Supreme Court thereby strengthens the cause of justice bearing in mind that there could be grounds that such a decision was in violation of natural justice and that there was an abuse of the court’s judicial process.

(d) Due Process Interpretation of Existing Constitutional Provision on Legal Aid

Poverty and inability to pay for the services of an attorney are common reasons why most women cannot seek legal redress for certain abuses and violation of rights.

⁸⁰ AIR 2002 SC 1771

Therefore, legal aid is necessary to “widen the road” and ensure uninhibited access to justice as basic human right necessary to guarantee women’s right to dignity and freedom from exploitation.⁸¹

Similar to the legal aid provision in the 1999 Nigerian Constitution, Article 39A of the Indian Constitution does not create a positive right to legal aid. Article 39A simply oblige the State to ensure that the legal system promotes equal justice to all by providing “*free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.*”

Prior to the judicial creativity and activism of the later Supreme Court of India, the scope of legal aid was restricted to the right of the applicant to engage the services of a lawyer of his choice and not a right to be offered the services of a lawyer at the expense of the state.⁸²

However, by the courage, creativity and interpretative activism of the later Supreme Court with the likes of Justice P.N. Bhagwati, the right to free legal aid was read into the right to life and enforced as part of the fundamental rights.⁸³

Under an earlier form of judicial activism, the Supreme Court, per Krishna Iyer, JSC held in *M.H. Hoscot v. State of Maharashtra*,⁸⁴ that the state was bound to provide free legal aid to an indigent, or incommunicate person as a constitutional right, if the circumstance and justice of the case permits.

But in *Hussainara Khatoon v. Home Secretary, State of Bihar*⁸⁵ Justice Bhagwati strengthened the decision in *Hoscot* by applying the *fair, reasonable and just* rule and observed that the right to legal aid is fundamental and may only become immaterial if the beneficiary refuses to accept it. He further expanded this concept when he held in

⁸¹ S.L.A. Khan (2001) JUSTICE BHAGWATI ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES, *op.cit.*, p. 156.

⁸² Tara Singh v. State, AIR 1951 SC 441; Janardhan Reddy v. State of Hyderabad, AIR 1951 SC 217.

⁸³ S.L.A. Khan, (2001) JUSTICE BHAGWATI ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES, *op. cit.* p. 155.

⁸⁴ AIR 1978 SC 1548.

⁸⁵ AIR 1979 SC 1369.

Khatri v. State of Bihar,⁸⁶ that the due process application of Article 39A creates a continuing right to legal aid which attaches to the accused person from the time of his first arraignment before a magistrate up till his final appeal at the Supreme Court, and that it also creates an unqualified constitutional obligation on the state to provide the legal aid irrespective of any real or imagined administrative or financial constraints. And above all, the Indian Supreme Court also noted that a fundamental right cannot be waived by the vulnerable or weaker party as that would be contrary to public policy.⁸⁷ This new concept of legal aid also covers social action groups and voluntary organisations that render legal aid services to the deserving public, especially at the grassroots.⁸⁸

This is a realistic lesson for Nigeria because it underscores the point that a creative, courageous and activist judiciary possesses the interpretative power to reform the law by bridging inherent gaps in a defective legislation or porous Constitution.

(e) Judicial Creativity and Activism in the Application of International Law

Unlike the Constitution of South Africa, the Indian Constitution, like its Nigeria counterpart, does not contain any specific provision which mandate domestic courts to apply international law in preference to municipal law. However, by its uncommon activism and creativity in interpretation, the Indian Supreme Court have had to apply international human rights law, though not domesticated, in resolving vital issues on women's rights to dignity and sexual independence.

For instance, it relied on international law to formulate the *Vishaka Guidelines* for the protection of women's dignity against sexual harassment at the workplace, at a time when there was no legislation on the subject and insisted that:

⁸⁶ *Khatri v. State of Bihar*, AIR 1981 SC 928.

⁸⁷ *Nar Singh Pal*, AIR 2000 SC 1401.

⁸⁸ *Centre for Legal Research v. State of Kerala* 3 SCJ 1986 SC 17. It must be borne in mind that although the right to free legal aid so far discussed generally applies to an accused person in a criminal trial, it can also be inferred in respect of a woman seeking justice for the violation of her right to dignity under Article 21.

Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right... The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the judiciary in the LAWASIA region.⁸⁹

This is a proper lesson for Nigeria where the courts doggedly uphold the provision of Section 12 of the 1999 Constitution against the recognition or enforcement of any international treaty which has not been domesticated into the laws of Nigeria.

(f) The Three-Step Rule of Constitutional Proportionality

Section 31 (2) of the 1999 Nigerian Constitution permits the derogation of fundamental rights including the right to human dignity as well as the right to life. And the Supreme Court of Nigeria confirmed this in *Medical and Dental Practitioners Disciplinary Tribunal v. Emewulu & Anor*⁹⁰ where it held that all rights and freedoms are subject to limitations of overriding public interest or state policy.

In India, Article 19 (2)-(6) of the Constitution also permits reasonable executive, legislative or administrative action which seeks to limit the enjoyment of certain rights, excluding the right to dignity or life.⁹¹ Nonetheless, the Indian Supreme court has by its creativity and activism, interpreted Article 19 to imply that in the exercise of its power to derogate from certain fundamental rights, government must show that the derogation is inevitable, reasonable and fair, and would not cause more harm to fundamental rights

⁸⁹ *Vishaka & Ors v. State of Rajasthan & Ors*, JT 1997 (7) SC 384.

⁹⁰ [2001] 3 S.C.N.J. 106.

⁹¹ Article 19(1) lists the affected rights to include the right to freedom of speech and expression; freedom to assemble peaceably and without arms; freedom to form associations or unions; freedom to move freely throughout the territory of India; freedom to reside and settle in any part of the territory of India and freedom to practise any profession, or to carry on any occupation, trade or business within the territory of India.

than it seeks to protect. In simple terms, this is what the court described as the *Three Step Rule of Constitutional Proportionality*.

This rule suffices that the ‘reasonable restrictions’ which the State could impose on the fundamental rights should not be arbitrary or of an excessive nature, beyond what is required for achieving the objects of the legislation. Therefore, legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it strikes a “proper balance between the rights guaranteed and the control permissible under arts 19(2) to (6). Otherwise, it must be held to be wanting in that quality.”⁹²

The burden of proof lay on the state to show that the restriction was reasonable and proportionate. In deciding on the proportionality and reasonableness or otherwise of a restriction or limitation, the High Court or Supreme court “must keep in mind the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition as well as the prevailing conditions of the time.”⁹³

The Indian Supreme Court also applied this rule in the case of *Om Kumar & Ors v. Union of India in Delhi Development Authority v. Skipper Construction & Anor*⁹⁴ and further explained the rule thus:

By ‘proportionality’, we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order

⁹² Per Mahajan J (as he then was) in *Chintaman Rao v State of Uttar Pradesh* [1950] SCR 759.

⁹³ See the observation of Patanjali Sastri CJ in *State of Madras v. Row* [1952] SCR 597, as well as that of Jeevan Reddy J in *State of AP v Mc Dowell & Co* (1996) 3 SCC 709.

⁹⁴ [2001] 4 LRI 1049.

may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve. The legislature and the administrative authority are however given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.⁹⁵

This rule therefore offers a reasonable lesson for Nigeria and other developing democracies in Africa and Asia.⁹⁶

(g) Laws Inconsistent With or in Derogation of the Fundamental Rights: Article 13

India's jurisprudence for the protection of women's dignity is also inherent in Article 13 of its Constitution which voids every law, order, bye-law, rule, order, "custom or usage" that are inconsistent with or in derogation of the fundamental rights.

This provision is an additional platform upon which the court may void any dehumanizing customs and practices related to *Sati* or dowry or the "order or directive" of tribal elders which abuse the dignity or sexual independence of women.

(h) Introduction of "Social Justice Bench" at the Supreme Court

In 2014, His Lordship Chief Justice of India H. L. Dattu, directed the setting up in the Supreme Court of India of a special "Social Justice Bench" comprising of Honourable Justices Madan B. Lokur and Uday U. Lalit for the specific purpose of hearing and disposing both pending and fresh matters relating to women and children, and that in

⁹⁵ See Para. 29, page 12 of the judgement.

⁹⁶ Technically, the South African Constitution does not permit any derogation of the rights contained in its Bill of Rights. And in Malaysia, the Federal Court re-affirmed this three-step test per Dato' Gopal Sri Ram FCJ in *Sivarasa Rasiah v. Badan Peguam, Malaysia* [2010] 2 MLJ 333, (FC) at para 30 at p 351 where his Lordship held thus:

"[A]ll forms of state action-- legislative or executive measure — that infringe a fundamental right must:

(a) have an objective that is sufficiently important to justify limiting the right in question;

(b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and

(c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve."

order to ensure that these matters are monitored on regular basis, the special bench will continue to sit on every working Friday at 2.00 p.m.⁹⁷

This is indicative of keen interest in the matter of women and children's rights in India and further to the realization of "social justice" which is one of the focal points in the Preamble to the Constitution of India, 1950. And of course, part of this "social justice" includes taking steps to protect the safety and dignity of women and children and secure their living conditions by tackling untimely death due to lack of proper nutrition; providing night shelter for homeless and destitute women and children among others.⁹⁸

This is a step in the right direction which Nigeria and other developing countries, both in Africa and Asia, may do well to follow.

5.5.1.4 Lessons on Proactive Legislating and Legislative Advancement on Broad and Specific Protection of Women's Dignity and Sexual Independence

Unlike Nigeria, India has realistic criminal jurisprudence on domestic violence, sex-selection, equality and sexual rights of abled and disabled women and the girl-child.

It is therefore an exemplary lesson for Nigeria that in addition to the elaborate provisions of India's criminal jurisprudence on rape and sexual offences, that is, the Criminal Law (Amendment) Act, 2013, the country still possesses legislation for the protection of equality and sexual dignity of disabled women and girls. The country also has legislation against dowry and sex-selection to save the unborn female foetus. Such law would be reasonable to address and outlaw the indignity and violence suffered by Nigerian women as a result of the cultural menace of son preference, especially in South East Nigeria.

⁹⁷ India Lawyers Word Press of 12 March 2014, <https://indialawyers.wordpress.com/2014/12/03/supreme-court-constitutes-a-special-bench-titled-as-social-justice-bench-for-hearing-matters-related-to-women-and-children/> (6/5/2015).

⁹⁸ India Lawyers Word Press of 12 March 2014, *ibid*.

Specifically, some of the legislative lessons considered include:

(a) Elaborate Legislation on Domestic Violence

In addition to constitutional guarantees and a fearless and innovative judiciary, India also has a pro-active legislature and women-sensitive legislation which meet the minimum requirements of international law for the protection of women's dignity and accordingly constitute reasonable lessons for Nigeria.

For instance, Nigeria has no national legislation on domestic violence; but in India, the Protection of Women from Domestic Violence Act, 2005 takes a sweep at domestic violence generally and offers protection to a wife or female co-habiting partner against violence from her husband or male partner or their relatives. The Act also covers mothers, widows as well as biological and adopted sisters by prohibiting and criminalizing every domestic violence (invariably including marital rape)⁹⁹ and those act, omission or commission of a respondent (husband, live-in lover, partner or other family member of the aggrieved woman/female victim) which harms, injures or endangers her mental or physical well-being, or tends to cause her any form of physical, sexual, economic, verbal and emotional abuse or with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security including threat of any such or similar abuse.¹⁰⁰

The Act rightly and ingeniously contemplates that domestic violence may be perpetrated in or out of marriage and by persons (whether male or female) other than a husband, for instance, his relatives, and therefore empowers the aggrieved women to even sue any such "relative" as respondent.¹⁰¹

⁹⁹ Ojilere, A., & Gan, C. C. (2015). Learning from the Indian Judiciary: New Directions for Securing Nigerian Women's Right to Dignity. *Asian Women*, 31(1), 81-106, at 98.

¹⁰⁰ It needs be noted that while dowry related violence against women is not common in Nigeria, other forms of domestic violence abound.

¹⁰¹ Section 2 (q) of the Act defines "respondent" to mean "any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner."

The Act also protects the reproductive rights, sexual choices and property rights of women and against common psychological trauma and ridicule associated with childlessness or not having a male child, among others.¹⁰² Such provision, if applied to Nigeria would constitute a sustainable framework against most common abusive cultural practices which constitute flagrant breach of women's right to dignity in Nigeria.

To protect the parties' privacy, Section 16 of the Act provides that proceedings may be heard in camera. Under Section 18, the court may also make Protection Orders restraining the abusive husband or partner from committing or aiding any further abuse, or from entering the woman's workplace or her favourite locations, or even attempting to communicate her by any physical or electronic or telegraphic manner, or issuing a threat to any of her relatives or friends.

Above all, a petition under the Act may even ensue for violations which took place before the commencement of the Act, even if the parties no longer live together.¹⁰³

It is therefore understandable that erudite Indian female scholar Usha Kiran Rai¹⁰⁴ describes the Act as one which expansively captures the abuse of women with some degree of precision and a clear and unambiguous statement of the right of women to be free.

This thesis therefore, humbly contends that the elaborate provisions and unambiguous language of India's Protection of Women from Domestic Violence Act, 2005 is another

¹⁰² See Section 3 *op.cit.*

¹⁰³ *V.D. Bhanot v. Savita Bhanot* (2012) 3 SCC 183. In that case the Supreme Court considered the constitutional protections in Article 21 of the Constitution vis-à-vis the provisions of Sections 31 and 33 of the Domestic Violence Act and concluded that the Object of the Act is to protect the rights of women under Articles 14, 15 and 21 of the Constitution as a way of guaranteeing their dignity.

¹⁰⁴ Usha Kiran Rai, "*Protection of Women from Domestic Violence Act: A Search for New Paradigms*" http://www.academia.edu/1342148/Protection_of_Women_from_Domestic_Violence_Act 12/11/2013.

lesson which may be reasonably applied to reform the current legal framework for the protection of women's right to dignity in Nigeria.

(b) Elaborate Criminal Jurisprudence on Rape and Sexual Offences

The Criminal Law (Amendment) Act 2013 is a comprehensive legislation for the protection of women against various sexual indignities in India.¹⁰⁵

Generally, the law is an anti-rape legislation which creates new offences of sexual harassment, stalking and voyeurism and also increases the punishment and trial procedure with respect to acid attack, dowry violence or death and existing sexual offences including as rape and gang rape. It also criminalizes the disrobing of the girl child among others.

Remarkably, the Criminal Law (Amendment) Act, *inter alia*, amends the Code of Criminal Procedure, 1973 and accord women certain privileges. Now, under Section 160 (1) of the Code, any police officer investigating a crime may, by order in writing, invite any person as witness but if such intended witness is a woman her statement will be recorded only at her residence.

By Section 46 (4), no woman shall be arrested after sunset and before sunrise, except in exceptional circumstances, and even so, the arrest can only be made by a police woman and with the written permission of the Judicial Magistrate of the area. Upon notifying the woman orally of her arrest, she is presumed to have submitted thereto and a male police officer shall not touch her person to effect arrest or search.¹⁰⁶

Furthermore, any physical/medical examination after arrest shall only be conducted on her by or under the supervision of a female registered medical practitioner, and if she is

¹⁰⁵ Ojilere, A., & Gan, C. C. (2012/2013). Criminal Law (Amendment) Act, 2013: An Introductory Analysis of India's Criminal Jurisprudence on the Protection of the Sexual Independence and Dignity of Women. *Nigerian Journal of Legal Studies (NJLS) Faculty of Law, Imo State University, Owerri.*, XI, 65-83. The Act amends the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872 and the Protection of Children from Sexual Offences Act, 2012.

¹⁰⁶ Section 51 (2) of the Code.

below eighteen years, she shall not be detained in a police station or jail but an Observatory Home.¹⁰⁷

Interestingly, any trial for rape under the Indian Penal Code, shall, as far as practicable, be presided by a female judge or magistrate.¹⁰⁸

With specific reference to the dignity of the girl-child, India has the Protection of Children from Sexual Offences Act, 2012 (also amended by the Criminal Law (Amendment) Act 2013. The 2012 Act criminalizes every form of sexual abuse or sexual intercourse with a person below 18 years including the taking advantage of any mental or physical disability of such person or her other vulnerability¹⁰⁹ to effect the abuse, impregnate her or infect her with HIV/AIDS or other life-threatening diseases .

Only recently, the 7th Senate of the Federal Republic of Nigeria passed a new Sexual Offences Bill, 2015 similar to the Criminal Law (Amendment) Act of India. Regrettably, the new Bill is fundamentally deficient *vis-à-vis* the Indian law and basic tents of international human rights law on children because it criminalizes “sexual intercourse with a girl below 11 years of age.” This is invariably a deviation from the definition of a child in both regional and international law as a person below 18 years. Suffice to say that Nigeria still needs to learn new lessons from India in this regard.

(c) Criminal Jurisprudence on the Equality and Sexual Rights of Disabled Women.

The Persons With Disabilities Equal Opportunities, Protection of Rights and Full Participation Act, (PWD Act) of 1995 was India’s landmark legislation for the specific protection of disabled people. It was applauded because for “the first time in the history

¹⁰⁷ Section 54 of Code of Criminal Procedure

¹⁰⁸ Section 26 of the Code.

¹⁰⁹ Such vulnerability includes being in a position of authority over the child, or in in charge of a home, hospital, police lock-up, prisons or like institution where she is kept custody.

of independent India, a separate law had been formulated which talked about the multiple needs of disabled people”.¹¹⁰

In addition to this, the Criminal Law (Amendment) Act 2013, for the first time, makes a legal provision specifically targeting sexual offences against disabled people by categorising sexual assault against the disabled as a serious sexual offence akin to sexual assault in custody or against a pregnant woman or minor.

The Act also amends the Indian Penal Code to the extent that Section 376 (2) thereof prescribes a punishment of between 10 years and life imprisonment for persons in authority including policemen, public officers, trusted persons, close family relatives, caregivers, owners and managers of custodial or health institutions for women or children, or like facilities who violate the sexual dignity through rape, of a woman with mental or physical disability or otherwise incapable of giving consent.¹¹¹

Furthermore, in the case of *Suchitra Srivastva v. Chandigarh Administration*,¹¹² the Indian Supreme Court emphasised the equality and dignity right of disabled women when it held that a disabled woman could keep a pregnancy in spite of her parent’s contrary wish, as long as she had insisted that she wanted to have the baby. Hence, a World Bank report confirms that “India has one of the more progressive disability policy frameworks in the developing world.”¹¹³ This thesis therefore believes that if such legislative advance may be reasonably applied to Nigeria to help bridge legislative gaps and reform the current legal framework for the protection of the rights to dignity of the disabled women and disabled girl-child in Nigeria.

¹¹⁰ Swagata Raha, *India needs new legislation on Disability Rights*. Infochange Disabilities, <http://infochangeindia.org/disabilities/analysis/india-needs-new-legislation-on-disability-rights.html> (8/6/2015).

¹¹¹ In spite of these advances, the call has been made for India to improve on its legal framework for the greater protection of people with disabilities. See Badjena, S. S. (2014). Sexual Violence Against Women with Disabilities and the Legislative Measures in India. *ODISHA REVIEW* (April-May 2014), 46-57, at 55.

¹¹² AIR 2010 SC 235 (Civil Appeal No. 5845/2009, judgment delivered 28 August 2009)

¹¹³ O’Keefe, P., Unit, H. D., & Region, d. E. A. (2007). People with disabilities from India: from commitments to outcomes. *Human Development Unit, South East Asia Region, The World Bank*, 157, available at: http://siteresources.worldbank.org/INDIAEXTN/Resources/295583-1220435937125/Philip_Okeefe_1_1a.pdf (8/6/2015).

(d) Specific Legislation against Caste, Dowry and Sex Selection

Caste related violence is not as common in Nigeria as in India. However, women in both countries suffer common indignity related to dowry (albeit in various forms and with different consequences) Son preference and sex selection may lead to divorce, abuse or polygamy in Nigeria but they additionally lead to the unlawful killing of female foetuses in India. However, the Indian legal framework address these issues by specific legislation, particularly, the Dowry Prohibition Act, 1961 (including certain specific Penal Code protections against dowry), Pre Conception and Pre Natal

Diagnostic Techniques (Prohibition of Sex Selection) Act 1994, Criminal Law (Amendment) Act 2013, among others, but this is not so in Nigeria.

In addition to these, India also has the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013,¹¹⁴ a legislation for the specific protection of the sexual dignity of women at their workplace. These legislative advances constitute reasonable lessons for Nigeria because no such legislation currently exists in Nigeria.

5.5.1.5 Unique Pro-Active Political Actions for Women's Safety and Sexual Dignity

In addition to the several judicial and legislative strides earlier discussed, the Indian government has also taken unique pro-active political steps to promote and protect the safety, empowerment and sexual dignity of women which Nigeria will do well to learn from. Some of these unique pro-active political actions include the following:

1. **Establishing an All-women Bank, the Bharatiya Mahila Bank [BMB]:** This special bank was established by the Indian Government with an all-women eight-member Board of Directors. It caters for the special credit needs of women

¹¹⁴ This is the legislative version of the *Vishaka* guidelines.

and women self-help groups,¹¹⁵ who ordinarily cannot provide required collateral to secure facilities from regular banks, thereby eliminating the possibility of demeaning their safety or compromising their sexual dignity in the course of desperately trying to obtain credit.

2. **Direct Access to Prime Minister for Public Complaints on Violation of Women's Dignity:** To prevent victim-blaming discourage which prevent women from reporting cases of sexual violations,¹¹⁶ and address allegations of police insensitivity or neglect to follow-up complaints by female victims of rape and sexual indignity, the Indian Prime Minister announced that that such complaints be made directly to his office, or to him in person, via email or post, or any of his social media pages, and therefore hold him directly responsible if their complaints are not handled satisfactorily. This is a unique manifestation of pro-active commitment to protect women's right to dignity which the government in Nigerian, and even the South Africa, may reasonably follow.
3. **The Banning of *Uber* Online-Hailing Taxi Services in India:** It was recently reported in the Indian media that the Union Government of India had banned "all operations by private cab service, *Uber* with immediate effect and blacklisted it from providing any transport service in the national capital... a day after a taxi driver employed by *Uber* was arrested from Mathura for allegedly raping a 27-year-old woman in his cab."¹¹⁷

¹¹⁵ Zee News India: http://zeenews.india.com/business/news/economy/bharatiya-mahila-bank-for-economic-empowerment-of-women-pm_89058.html (25/11/2013).

¹¹⁶ Joseph, M. G. C., Kirchhoff, G. F., Maden, S. R., & Barkhuizen, J. (2014). Asian passengers' safety study: the problem of sexual molestation of women on trains and buses in Chennai, India. *Acta Criminologica*, 27(1), 57-74.

¹¹⁷ The Times of India, Delhi 8 Dec, 2014: <http://timesofindia.indiatimes.com/city/delhi/Delhi-govt-bans-Uber-cab-service-following-rape-incident/articleshow/45411516.cms> (28/4/2015). The ban was premised on the reasoning that the safety and sexual dignity of prospective female passengers was compromised by the US-based company *Uber* by failing to diligently seek and obtain police background check on its drivers before employing them, and therefore must be vicariously liable for the violation of the woman's dignity by their drivers.

Although sexual molestation of women in public transportation is prevalent in India and other parts of the world,¹¹⁸ this is not yet the case in Nigeria. However, Nigeria generally stands to learn valuable lesson from the pro-active and decisive steps commonly taken by the Government of India to protect its women and girls.

4. **The First Mahila Police Station [Women Police Station]:** Established at Jaipur in March, 1989. All cases as rape, sexual harassment and exploitation of women are registered here and investigated mainly by female police officers. Statistics show that the number of female police investigating and prosecuting officers currently serving in the state is at par with their male counterparts.¹¹⁹
5. **Rashtriya Mahila Kosh (National Credit Fund for Women):** It was launched in 1993 to encourage socio economic development. The Fund's main objective is to provide micro- credit to enable and encourage poor women to engage in various forms of income generating and livelihood support activities at concessional terms.¹²⁰
6. **The NIRBHAYA Fund for Women's Safety:** This special fund was also set up in India to provide counselling and funds for litigations and victim-support services to women. This is to ensure that financial constraint does not hinder any woman's right to seek or obtain legal, administrative or other redress for the violation of her right to dignity.
7. **Gender Budgeting and Economic Empowerment of Women:** In a committed bid to curb gender inequality, the Government of India has adopted "gender

¹¹⁸ Joseph, M. G. C., Kirchhoff, G. F., Maden, S. R., & Barkhuizen, J. (2014), *ibid*.

¹¹⁹ <http://www.police.rajasthan.gov.in> (5/5/2015).

¹²⁰ Nayak, A. (2011). List of Government Schemes Available for Economic Empowerment of Women in India. <http://www.wcd.nic.in/schemes.htm>. (Quoted in Jain, A., & Gambhir, M. S. (2015). Socio-Economic Women Empowerment: Sharp Focus. *International Journal of Advanced Research in Management (IJARM)*, 6(1), 38-49.

budgeting” (GB) which is aimed at ensuring that Government’s policy commitments on gender equity are translated into budgetary allocations. Further to this, in 2005, the Indian Government also formed Gender Budget Cells (GBC) within all Central Departments.¹²¹

8. **Introduction of New “Social Justice Bench” at the Supreme Court:** In order to give priority attention to all suits in the Supreme Court relating to women and children, the Chief Justice of India established a special bench to specifically deal with all such cases. This will ensure the quick disposal of pending cases as well as urgent attention to new cases so as to ensure speedy justice delivery for women and children.
9. **Launching of *SOTERIA* Free Emergency Android Application for Women’s Safety and Crime Control:** This is a new technology specially developed to fight violations to women’s dignity. With this new application, a woman can save the telephone numbers of any three persons whom she may wish to contact in case of emergency. By merely touching the application or pressing the CALL button, the application automatically sends out SOS text messages to the three numbers, indicating also the location of the woman. It may also send status messages on Facebook. This is highly innovative and would serve well in Nigeria.
10. In addition to the *Soteria* Online digital application support for women, the Indian government also introduced comprehensive Legal and Counselling Centres and 181 Mobile Helpline Services for Women in Distress, as well as a 24/7 Gender Help-Desk Centres for Women and Children.

¹²¹ *Ibid.*

Apart from lessons inherent in the basic content and essence of these policy advances and unique acts by the government to enhance the protection mechanism for women's right to dignity in India, it is imperative for Nigeria to particularly take additional cue from the decisive political will and pro-active response underscored in some of these advances.

5.5.2 Lessons from the Advances in South Africa

The most important lessons which Nigeria may reasonably learn from South Africa are more on constitutional advances than on any other. However, apart from lessons based on the independence and pragmatism of the South African Constitutional Court, the following other lessons on advanced constitutionalism in South Africa may, over time, be adapted and applied in Nigeria.

5.5.2.1 Constitutional Guarantee of Economic, Social and Cultural Rights.¹²²

The South African Constitution also guarantees economic, social and cultural rights as justiciable positive rights in the Bill of Rights but in Nigeria these rights appear in Chapter II of the Constitution as Fundamental Objectives and Directive Principles of State Policy which are non-judicial because they are *mere aspirations* of government.

5.5.2.2 Right of Access to the South African Constitutional Court for Enforcement of the Bill of Rights

Although the South African Constitutional Court is the highest Constitutional Court as well as the highest court of appeal in the land, just like the Supreme Court of Nigeria, however, unlike its Nigerian counterpart, the Constitution of South Africa permits direct access to the Constitutional Court for the enforcement of the Bill of Rights when it is in

¹²² The researcher wishes to restate that applying the classical South African model of constitutionalism in Nigeria can only be as a last resort and in the very long run because they will entail the time-consuming process of constitutional amendments which may not be forthcoming for obvious reasons of the "Nigerian Factor." For the realistic reform of the constitutionalism of women's right to dignity in Nigeria, it will therefore be more auspicious and realistic to adopt and apply the Indian model of judicial creativity and activism which is time-effective, instant and sustainable.

the interest of justice or in the public interest. Such access is also permissible through public interest litigation. But direct individual access to the Supreme Court of Nigeria for the enforcement of the fundamental rights is only permissible on appeal.

5.5.2.3 Constitutional Non-Derogation of the Rights to Human Dignity and Life

Section 36 (2) of the South African Constitution provides that ‘no law may limit any right entrenched in the Bill of Rights.’ This provision is made subject to Section 36 (1) which permits limitation to the extent that it is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.’

However, the rights to dignity and life are sacred and inviolable. In the celebrated case of *S v. Makwanyane*¹²³ the Constitutional Court declared these rights as “the most important of all human rights, and the source of all other personal rights.”¹²⁴

The non-derogation of the rights to life and dignity also endures against the Parliament and even in times of a lawfully declared state of national emergency or war under Section 37 (1) of the Constitution. Thus, Section 37 (5) (c) of the Constitution of South Africa provides that ‘*No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise any derogation from the right to human dignity in Section 10 and the right to life in Section 11 of the South African Constitution.*’

¹²³ 1995 3 SA 391 (CC).

¹²⁴ *Ibid* at para 144.

This is a reasonable lesson for Nigeria where fundamental rights including dignity and life may be derogated under Section 33(1) of the 1999 Constitution.

5.5.2.4 Constitutional Guarantee of Women's Reproductive Rights

In addition to all other rights contained in the South African Bill of Rights, Section 12 (2) of the Constitution also enshrines the specific guarantee of women's physical and psychological integrity and reproductive rights. There is also the specific constitutional guarantee of the rights of children in Section 28 thereof.

These are high points in South Africa's constitutional framework which Nigeria may apply to bridge the gaps and reform its framework for the protection of the right to dignity of women as well as the girl-child.

5.5.2.5 Application of International Law

The South African Constitution enjoins courts to always apply international law in the interpretation of the Bill of Rights, and to always prefer international law to municipal law when international law offers greater protection. It also obliges courts to interpret legislation in a manner as to conform to the standard template of international law on the subject. These advances will provide useful lessons for Nigeria where the courts are not obliged to apply international law except where such law is domesticated into the laws of the Federal Republic of Nigeria in accordance with Section 12 of the 1999 Nigerian Constitution.

5.5.2.6 Constitutional Provision for NGO Participation

The South African Constitution, 1996 lays a solid foundation for NGO participation in human and women's rights issues in the country. In its Section 184 (3) the Constitution requires relevant state organs to furnish the South African Human Rights Commission (SAHRC) with "information on the measures they have taken towards the realization of the rights in the Bill of Rights." For instance, during the "human tissue" controversy in

South Africa under which married women required the consents of their husbands before in-vitro fertilization and single women were out-rightly prohibited from having same, some women/groups complained that the relevant provisions of the Human Tissue Act 65 of 1983¹²⁵ was discriminatory against women. The SAHRC's intervention on the matter necessitated the Human Tissue Amendment Act 51 of 1989 which reversed the offensive provisions of the old Act.

5.5.2.7 Independence and Pragmatism of the South Africa Constitutional Court

While the Indian Supreme Court has been prided and applauded for its 'innovation and activism', the South African Constitutional Court has been applauded for its 'independence and pragmatism'. The *innovation and activism* is with respect to the Indian Court exhibiting ingenuity in 'broadening' the definition of the fundamental rights and directive principles, and in 'making law' where legislation is lacking, while the *independence and pragmatism* of the Constitutional Court of South Africa is manifest in the courage to emphasise the obligation of the South African state to respect, protect and promote constitutional rights in the Bill of Rights in spite of any administrative or political odds.

Even though Jackie Dugard has criticised the South African Constitutional Court for being anti-poor with respect to reluctance in the granting of direct access 'in the public interest' or 'in the interest of justice' to enforce socio-economic rights, the independence and pragmatism of the Court in this regard particularly in relation to the right to dignity of women is clear from certain landmark judgements which directly or indirectly address the subject. These decisions emphasise the obligation of the state to give special deliberative attention to those whose minimal needs are not being met and thus, stand as a powerful rejoinder to countries like Nigeria where socio-economic

¹²⁵ Commenced on 12 July, 1985.

rights still stand as negative, unenforceable, non-*fundamental rights* in the Constitution and before the courts. It has been suggested too that such rights can serve, not to preempt democratic deliberation, but to ensure democratic attention to important interests that might otherwise be neglected in ordinary debate.¹²⁶

The judicial pragmatism of the South African Constitutional Court is manifest in a number of cases and instances including:

(a) Judicial Pragmatism in the Development of Common Law

This avowed pragmatism of the South African Constitutional Court is manifest in a number of cases. Section 39(2) of the Constitution of South Africa provides that “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

Accordingly, in *F (Applicant) v. Minister of Safety and Security & 5 Ors* (The F case)¹²⁷ the Court upheld the vicarious liability of the State for not giving adequate consideration to the dignity, protection and safety of a woman which made her vulnerable to rape by a police officer on stand-by duty. In that case, a police officer on ‘stand-by’ offered a ride in a police car to a girl who was stranded at night after leaving a night club. Although she was suspicious of him as a stranger in plain clothes, she nonetheless “trusted” him because he drove a police car, had police docket and radio in the car, and told her that he was a “detective” (a term which the victim understood to mean a “policeman”), and more so, the form of assistance offered to her by the police officer was one that is commonly offered by the police to people who are stranded. Nonetheless, he had driven her to a dark place and assaulted and raped her.

¹²⁶ Sunstein, C. R. (2001). Social and economic rights? Lessons from South Africa. *John M. Olin Program in Law and Economics Working Paper No. 124*.

¹²⁷ CCT 30/11 [2011] ZACC 37.

In addition to criminal charges against the police officer, the High Court also held the Minister of Safety and Security vicariously liable for the crime. The Minister took the matter to the Supreme Court which reversed the order of the High Court on the ground that the police officer was not on duty but merely on “stand-by” and therefore was on a frolic of his own. On further appeal to the Constitutional Court, the court found the Minister vicariously liable because the police officer was at all times before, during and after the rape an officer and that he drove a police car which was maintained at the expense of the State, and that being on “stand-by” meant that he could be called upon to perform any special duty. Moreover, the minister was not diligent in protecting people like the victim because he had employed the accused person as police officer in spite of his record of conviction for sexual violation of women.

Similarly, in *Carmichele v. The Minister of Safety and Security & The Minister of Justice and Constitutional Development*¹²⁸ the Constitutional Court accepted arguments that by failing to take necessary steps to restrain or oppose bail for the accused despite repeated warnings to the police that the accused is notorious for rape and sexual violence, the police made itself vicariously liable to a subsequent assault on a woman by the accused. In that case, the police had been properly notified that the accused who was already facing criminal charges for sexual assault and violence is not a person who “should be out on the street” and “shouldn’t maintain a presence in society because my knowledge as a nursing sister and just in life is that a man that has committed two similar crimes is going to do it again.”¹²⁹

The applicant also insisted that the police failed in its duty to “ensure that she enjoyed her constitutional rights of *inter alia* the right to life, the right to respect for and protection of her dignity, the right to freedom and security, the right to personal privacy and the right to freedom of movement” especially as Section 8(1) of the South African

¹²⁸ CCT48/00 [2001] (4) SA938 (CC).

¹²⁹ *Ibid.*

Constitution provides that “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

The Court therefore held that that Section 8(1) imposed a duty on the state and all of its organs not to perform any act that infringes these rights, or invariably, there is a positive obligation on the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.

The Minister of Safety and Security, through the police, was therefore held vicariously liable to the victim for the assault on her because if the prosecution had opposed bail on the ground that the accused was in the habit of committing similar acts of sexual violence and assault or had been convicted therefor in the past, the magistrate may have refused bail and restrain the accused person.

The Supreme Court of Appeal in South Africa applied similar pragmatism in the case of *Van Eeden v. Minister of Safety and Security (Women’s Legal Centre Trust as amicus curiae)*¹³⁰ when it upheld the appeal of a woman for damages against the state for failing in its duty to care for her after she had been sexually assaulted, raped and robbed by a notorious and dangerous criminal who had escaped from police custody. The court held that the state was duty-bound to protect people against violent crimes by taking active steps to prevent violations of their constitutional right to freedom and security. It also emphasised that the state was also bound by international law to protect women against violent crime and that having failed in that duty, the state, as the employer of the police, was vicariously liable for its breach.¹³¹

The crux of these judgements is to underscore the pragmatism of the Constitutional Court in discharging its constitutional obligation to develop common law (in this case, the concept of “wrongfulness” in the law of delict) to conform to the spirit of the Bill of

¹³⁰ 2003 (1) SA 389(SCA).

¹³¹ See “Brief Summary” of the case in Maluleke, M. J., & Madonsela, T. (2004). *Women and the Law in South Africa: Gender equality Jurisprudence in Landmark Court Decisions* Department of Justice and Constitutional Development, Republic of South Africa, p.8.

Rights especially in the context of the globalization and sustainability of women's right to dignity.¹³²

In two other cases, the Court had also made separate orders protecting women's dignity in marriage: *Shilubana & Others v. Nwamitwa*,¹³³ as well as in protecting women's dignity with respect to inheritance rights: *Elizabeth Gumede v. President of the Republic of South Africa & Ors.*¹³⁴

(b) Judicial Pragmatism in the Interpretation of Socio-Economic Rights

The pragmatism of the Constitutional Court was particularly manifested in two prominent cases linking women's right to dignity with the guarantee of socio-economic rights to adequate housing and proper health care respectively.

In *Government of RSA & Ors v. Grootboom*,¹³⁵ the respondent with others including children, previously lived in an informal waterlogged squatter settlement in a poor neighbourhood without water, sewage or refuse evacuation services, and with almost no electricity. The area was also dangerously close to a main thoroughfare and many of the squatters had applied for subsidised low-cost housing from the municipality but waited almost hopelessly without luck. They had no choice but to move out and seek alternative settlement and shelters on private property already designated for low-cost housing, albeit without authorization.

The property owner served them eviction notice but they stayed on since they had nowhere else to go to. The magistrate ordered them to vacate the property and authorized the sheriff to evict them and dismantle their shelters. He also directed the

¹³² Maluleke, M. J., & Madonsela, T. (2004). *Women and the Law in South Africa: Gender equality Jurisprudence in Landmark Court Decisions* Department of Justice and Constitutional Development, Republic of South Africa, p. 5.

¹³³ (2008) ZACC 9.

¹³⁴ (2008) ZACC 23.

¹³⁵ [2000] ZACC 19.

municipality to provide them with suitable alternative accommodation but the municipality did not.

The respondent then applied for an order on the state to provide them with adequate basic temporary shelter or housing pending their obtaining permanent accommodation as well as basic nutrition, shelter, healthcare and social services to the respondents who are children.

The respondents based their claim on two constitutional provisions namely, the guarantee of the right of access to adequate housing under Section 26 of the Constitution (including the obligation on states under Section 26(2) to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources) and Section 28(1)(c) of the Constitution which provides that children have the right to shelter.

The respondents' attorney then wrote to the municipality describing their horrible and inhuman habitation and demanded that the municipality meet its constitutional obligations and provide temporary accommodation to the respondents. The respondents were not satisfied with the response of the municipality and launched an urgent application in the High Court which eventually granted their relief and the appellants now appeal against same.

The Constitutional Court held *inter alia*, that Section 28(1)(c) which provides that 'every child has the right to basic nutrition, shelter, basic health care services and social services' must be read together with Section 28(1)(b) which provides that 'very child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.'

It also held that the rights in Sections 26 and 28 do not take automatic effect rather they oblige the state to devise and implement a realistic programme to meet its Section 26

obligations, and that so far, the state has not met this obligation. The court therefore ordered the state to discharge the obligation imposed upon it by Section 26(2) of the Constitution.

The court further held that socio-economic rights enshrined in the Bill of Rights are imperative and do not exist only on paper, and that the state is bound by Section 7(2) of the Constitution “to respect, protect, promote and fulfil the rights in the Bill of Rights.”

Further, that socio-economic rights are justiciable in South Africa and that Section 38 of the Constitution empowers the Court to grant appropriate relief for the infringement of any right entrenched in the Bill of Rights. Accordingly, it ordered the state to provide the respondents with suitable alternative accommodation since the right to life and dignity cannot be separated from the right to adequate housing and safe environment.

The Court also reminded the Human Rights Commission of its obligation under Section 184 of the Constitution to ‘monitor and assess the observance of human rights in the Republic,’ and to ‘investigate and to report on the observance of human rights and to take steps to secure appropriate redress where human right have been violated.’¹³⁶

Similarly, in *Minister of Health v. Treatment Action Campaign*¹³⁷ the Constitutional Court held that the right to health was justiciable and further to the right to life and dignity in South Africa.

Although socio-economic rights are not justiciable in Nigeria, the above lessons from the South African Constitutional Court may be applied to trigger a culture of judicial pragmatism, activism for the globalization, constitutionalization, enforcement and sustainability of socio-economic rights in relation to women’s right to dignity in Nigeria.

¹³⁶ *Ibid.*

¹³⁷ Case No. CCT/8/02.

5.6 Conclusion

It is evident that, generally, *lacuna* exists in the national frameworks for protection of women's right to dignity in Nigeria, India and South Africa. However, fundamental gaps exist in the Constitutional and legislative frameworks in Nigeria, as well as in the attitude of Nigerian Courts to *locus standi* and the enforcement of economic, social and cultural rights. In India, the common gaps in the constitutional and legislative frameworks have been effectively bridged by the model creativity and activism of the Indian Supreme Court, especially in the broad interpretation of rights, thereby guaranteeing sustainable legal protection of women's right to dignity. The advanced constitutionalism in South Africa and the obvious pragmatism and independence of the South African Constitutional Court as an agent of transformation and change for the guarantee of women's right to dignity are also legendary. It is therefore realistic to rank the courts in India and South Africa among the "Consequential Courts" and "activist tribunals in the Global South."

This thesis therefore, most humbly believes, that the advances in constitutionalism, law and policy, judicial creativity and activism from India and South Africa as well as the unique political advances in India offer classical lessons for bridging the gaps and reforming the current framework for the protection of women's right to dignity in Nigeria, if they are reasonably applied. Such reform will certainly set the current legal framework for the protection of women's right to dignity, and human rights generally in Nigeria on the path to change, sustainability and globalization within the comity of the Global South.

CHAPTER 6

SUMMARY, RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

This Chapter concludes the thesis. It summarizes the entire thesis and makes recommendations for bridging the gaps and reforming the framework for the protection of the right to dignity of women in Nigeria, thereby meeting the core objective of the research.

Chapter 1 of this research set out four objectives of the research namely;

1. Explore the international framework for the protection of the right to dignity of women.
2. Critique the framework for the protection of women's right to dignity in Nigeria, India and South Africa.
3. Highlight the fundamental gaps in the framework for the protection of women's right to dignity in Nigeria *vis-à-vis* the advances in the legal framework of India and South Africa.
4. Make recommendations, based on advances in other jurisdictions, particularly India and South Africa, for bridging the existing fundamental gaps and advancing the quest for a sustainable legal framework for protecting the right to dignity of women in Nigeria.

The thesis also sets out to answer the following four research questions:

1. What is the legal framework for protecting the right to dignity of women in international law?

2. What is the existing national framework for the same protection in Nigeria, India and South Africa?
3. What gaps exists in the Nigerian framework vis-à-vis the advances in the other frameworks?
4. Based on the lessons from India and South Africa, what recommendations can be suggested to bridge the existing fundamental gaps and contribute to the quest for a sustainable legal framework for the protection of the right to dignity of women in Nigeria?

The various issues discussed in Chapters 2 seek to realize the first research objective and provide answers to the first research question.

The discussion in Chapters 3 and 4 seeks to achieve the second research objective and provide answers to the second research question.

Chapter 5 addresses the third research objective and seeks to answer the third research question while Chapter 6 seeks to meet the fourth research objective and answer the fourth research question. It also contains the Summary of the chapters and Conclusion.

Having examined the existing constitutional, judicial, legislative and policy framework for protecting women's right to dignity in Nigeria, India and South Africa, as well as in core regional and international frameworks on the subject, this thesis answers the research questions raised earlier in the thesis and meets all the research objectives.

6.2 Summary of the Chapters

Chapter one is the general introduction of the research and it contains the conventional preliminaries of a thesis including the meaning, definition, forms and conceptual basis of the research. It examines the meaning of human dignity and describes common

forms of the violation of women's dignity in the selected jurisdictions. It also defines certain core concepts relevant to this research namely, sexual violence, violence against women, patriarchy, judicial activism, judicial pragmatism, "*legisprudence*", the Global South and consequential courts.

Chapter two examines the legal framework for the protection of the right to dignity of women in international law, including basic UN instruments as well as thematic documents like the CEDAW and the Vienna Declaration and Platform for Action, relating to the protection of women's dignity as part of the broad human rights family. It also examines the substantive obligation of states in both regional and international human rights international law. It further reflects on the general attitude of the selected jurisdictions to the CEDAW Convention. Particularly, it examines the African Charter on Human and People's Rights and the Women Protocol to the African Charter, the African Court on Human and People's Rights, and allied institutions (with respect to Nigeria and South Africa only because Asia has no similar regional human rights mechanism which would bind India). Lastly, the chapter makes a critique of the international framework for the protection of women's right to dignity as well as the way forward.

Chapter three examines the constitutional framework, that is, the fundamental rights provisions and guarantees for the right to dignity of women in Nigeria, India and South Africa. It discusses also the relevant constitutional obligation (if any) and judicial attitude to the application of international law in the municipal human rights forum as well as the justiciability or otherwise of the directive principles of state policy particularly in Nigeria and India. Here, the researcher also discusses the nature of access to justice for the enforcement of fundamental rights in the highest courts in the three selected jurisdictions and examines inherent weaknesses in the various constitutional frameworks where they apply, as well as the way forward.

Chapter four examines the legislative and policy framework for the protection of the right to dignity of women in the selected jurisdictions including a critical highlight of inherent weaknesses where they apply. It discusses relevant legislation and amendments as well as policy for the protection of women's dignity especially against sexual violations.

Chapter five recapitulates and highlights the fundamental gaps in the current constitutional, legislative, policy and judicial framework for the protection of the right to dignity of women in Nigeria. This Chapter is, in fact, significant because it basically recasts the gaps which have been discussed earlier in the preceding chapters, the essence of which is to refresh the reader's memory in readiness for the recommendations in the next chapter for filling those gaps.

The Chapter also explores the advances, particularly on constitutionalism, and judicial creativity and activism in the frameworks of India and South Africa which may reasonably be applied as lessons to bridge the gaps in the current framework for the protection of the right to dignity of women in Nigeria. These advances include the enshrining of the second and third generation of rights as positive rights in the Bill of Rights in the South African Constitution, the broad definition of Article 21 (right to life and personal liberty) in the Indian Constitution to cover all other fundamental rights as well as the directive principles of state policy (that is, socio-economic rights) which are ordinarily non justiciable, the general judicial approach to the enforcement of *writ* petitions (fundamental rights) in India including Public Interest Litigation/Class Action Litigation and the epistolary jurisdiction of Courts.

Chapter six consists of the summary, recommendations and conclusion of the thesis. It summarizes each chapter of the thesis and highlights the findings on adequacy of the national, regional and international frameworks for the protection of women's dignity in

relation to the three jurisdictions under review. It also contains elaborate recommendations for the reform, globalization and sustainability of the current Nigeria's constitutional, legal and policy framework as well as judicial approach for the protection of the right to dignity of women.

And lastly, it highlights certain factors and conditions which may obstruct the implementation of the recommendations earlier made with respect to the quest for a sustainable legal framework for the protection of women's right to dignity in Nigeria.

6.3 Findings on Adequacy of the Existing National, Regional and International Frameworks

This research examined the legal framework for the protection of the right to dignity of women in Nigeria, India and South Africa and found that the Nigerian framework is grossly weak and the Nigerian judiciary, unlike its Indian counterpart, does not exhibit the creativity and activism necessary to remedy these many defects. The Indian framework has a few constitutional and legislative defects, but creativity and activism of its judiciary has virtually bridged every perceived gap. South Africa has the best framework amongst the three jurisdictions because of the elaborate justiciability of rights in its Bill of Rights. It was also found that although the Indian Constitution does not enshrine second generation of rights as positive rights, however, judicial activism in India has successfully resolved this constitutional inadequacy and in fact, effectively places the Indian framework at par with the South African framework. This explains why the Supreme Court of India and the Constitutional Court of South Africa are counted among the *Consequential Courts in the Global South*.

6.3.1 Findings on Adequacy of the Existing Framework in Nigeria

1. There is no national legislation for the specific protection of women's equality or dignity against domestic violence or sexual harassment at home or in the workplace in Nigeria. This has fuelled the continued patriarchal mind-set that the sexual violation of women's right is a usual practice and that marital rape is a domestic matter.
2. There is no law for guaranteeing sexual independence or reproductive rights of women in Nigeria.
3. It is therefore not strange that the government of Nigeria adopted the National Policy on Women in 2000 and its failure to effectively address gender inequality including political representation/participation of women in politics, necessitated its replacement in 2006 with the National Gender Policy amidst the "absence... of vibrant legislative structures to protect the rights of women."¹
4. Government apathy to issues of women's dignity and the imbalance in the number of female legislators in the National Assembly *vis-à-vis* the male legislators create a situation whereby matters relating to the dignity of women are considered as domestic/family matters which should not come to the front-burner of legislative matters. Accordingly, government often views issues relating to women as social issues of infrastructure connecting the welfare of children rather than issues of urgent national, political or international human rights importance. A case in point is the apathy of the Nigerian government in securing the release of over 200 girls (now globally known as "*The Chibok Girls*") abducted from their secondary school in Chibok, Nigeria by the militant Boko Haram sect, even though these girls have been in captivity since April

¹ Oby Nwankwo (2011). "Achieving Thirty-Five Percent Affirmative Action in 2011: The Role of Stakeholders and Implication for National Development," *The Nigerian Electoral Journal*, 4(1), 27-59 at p.30.

2014, and there is yet no official or independent evidence on the exact location of the girls, or that they are even still alive.

Nigerian President Muhammadu Buhari confirmed this in his first media chat with journalists on 30 December, 2015 in Abuja, when he said, *inter alia*:

*“The honest truth is that I don’t know the actual place and state of the girls. The more reason we are trying to be very careful before we negotiate with any group. Before we negotiate with any group, we must make sure they show us the actual location of the girls. We must make sure they are complete.”*²

5. The vulnerability of women with disabilities is not particularly contemplated in Nigeria. Thus, there is no legislation for the specific protection of the dignity of women with disabilities against sexual abuse in Nigeria.
6. There is a strong belief in and leaning to native customary law and socio-religious mythology in some Nigerian communities as a result of which women tend to accept their fate as appendages to men in society by positively conceding that women are not entitled to any more rights than “men” and “society” is willing to voluntarily offer them.
7. The judges of Nigerian courts are dogmatic and positivist in their approach to the interpretation and enforcement of the available provisions on right to dignity of women and fundamental rights generally. They do not exercise the activism necessary to effect sustainable change in a polity like Nigeria where legislation on women’s right to dignity are lacking or inadequate. For instance, Nigerian judges still consider fundamental rights provided in Chapter IV of the Nigerian Constitution as deserving of greater legal cum judicial protection and

² Morgan Winsor, “Buhari Presidential Media Chat: Nigeria Willing To Negotiate With Boko Haram To Save Chibok Girls” *International Business Times*, Wednesday, 30 December, 2015. <http://www.ibtimes.com/buhari-presidential-media-chat-nigeria-willing-negotiate-boko-haram-save-chibok-girls-2244763> (31/12/2015).

enforcement than human rights prescribed by international law. On the contrary, Nigeria needs an activist and creative judiciary, such as is common in India, in order to guarantee sustainable legal/judicial protection for women's right to dignity even where constitutional, legislative or policy provisions are inadequate or non-existent. Generally, judges of Nigerian courts seem unaware of the fact that Constitutional commitments to human rights are futile unless enforced by and through institutions established for that purpose, particularly those empowered to interpret the Constitution.³

8. The research also revealed that police and justice officers and health care providers in Nigeria have no special training or guide in the handling of rape cases and most women NGOs in Nigeria are concerned with issues other than those primarily bothering on anti-rape, sexual independence or women's right to dignity. Majority of these NGOs are however working in such related areas as girl-child education, women in politics, HIV/AIDS or maternal health and reproductive rights.

6.3.2 Findings on Adequacy of the Existing Framework in India

1. The research found that apart from India's Constitution of 1950 not enshrining second and third generation of rights as positive rights, as is common in the 1996 Constitution of the Republic of South Africa, India has an overall legal framework for the protection of the dignity against rape and sexual harassment of able-bodied women as well as women with disabilities, including children

³ NJ Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 47 55; (Quoted in Abiola Sanni, "Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reforms." 11 *Afr. Hum. Rts. L.J.* 511 2011, p.512

both at home, in custody and in their work places.⁴ This level of blanket protection also avails foreign women living in India.

2. It was also found that the far-reaching exercise of independence, creativity and activism of the Indian Supreme Court including the interpretation of Article 21 of the Indian Constitution to cover the fundamental objectives and directive principles has effectively bridged whatever gap that existed by not enshrining the second and third generation of rights as positive rights in the Indian Constitution.
3. It was further found that irrespective of a strong legal system, India's huge population of 1.3 billion as well as high illiteracy rate continue to pose a threat to the flow of knowledge and information available to most people with respect to available legal protections for women's dignity.
4. In some cases too, the patriarchal and religious myth of family honour as well as police complicity hinder women from reporting cases of sexual violations of their dignity to the police. Cases abound of some women who went to the police to make reports of rape and sexual violations, only to be raped again or sexually violated by some police officers.

6.3.3 Findings on Adequacy of the Existing Framework in South Africa

Both Constitutional and legislative guarantees for the protection of women's right to dignity in South Africa including the efficacy of the South African Constitutional Court, access to justice for the enforcement of the Bill of Rights, criminal jurisprudence on rape and marital rape were found to be adequate compared to those of Nigeria and India.

However, the scope and application of access jurisdiction for the enforcement of

⁴ For the avoidance of doubt, this thesis stated in Chapter 1 [1.8] that the reasons why sexual violations of women reportedly persists in India in spite of the formidable legal framework, is a sociological question which falls outside the scope of this research.

fundamental rights in India beats that of South Africa by miles because direct access to the Constitutional Court of South Africa is made subject to leave of the court granted to deserving cases when it is ‘in the public interest’ or in the interest of justice whereas in India, the applicant has a right of direct access to both the High Court and the Supreme Court, and may also benefit from the epistolary jurisdiction dictum which has become part of the Indian Constitutionalism.

6.3.4 Findings on Adequacy of the African Regional Framework

The research found that the penal authority of the African Commission on Human and Peoples’ Rights (also called ‘The African Commission’ which is responsible for implementing the African Charter) is simply ‘recommendatory’ and non-compelling, and consequently, most states including Nigeria⁵ have, at one time or the other, simply ignored the Commission’s recommendations.⁶ The Charter also contains some derogation clauses, which technically, diminishes and dilutes the rights and freedoms created therein. For instance, Article 6 provides *inter alia* that ‘no one may be deprived of his freedom except for reasons and conditions previously laid down by law...’ while Article 11, in limiting the right of free assembly, permits “necessary restrictions provided for by law.”⁷ This invariably threatens the efficacy of the Women Protocol to the African Charter. Worse of all, the Commission even has no way of monitoring or determining whether an indicted member state has complied with or is taking steps to comply with any of its recommendations.⁸

⁵ In the communication of the celebrated “Ken Saro-Wiwa and the Ogoni Nine” (*International Pen & Others (on behalf of Ken Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 8, the Nigerian government carried out the execution of the “Ogoni Nine” in violation of the recommendation of the African commission that the execution be suspended pending the final determination of their representative communication.

⁶ For instance, a 2003 Research carried out by Lirette Louw in South Africa showed that it was only in six cases out of 44 communications in which the African Commission found violation of the Charter did the concerned member states comply fully with its recommendations (See L Louw “An analysis of state compliance with the recommendations of the African Commission on Human and Peoples’ Rights” unpublished LLD thesis, University of Pretoria, 2005) 61.

⁷ See Articles 12 to 14 of the Charter.

⁸ JD Boukongou “The appeal of the African system for protecting human rights” (2006) 6 *African Human Rights Law Journal* 271at 288.

6.3.5 Findings on Adequacy of the Existing International Framework

The research found that cumulatively, the international framework for the protection of women's right to dignity have come to be accepted as a global template for setting the pace and measuring compliance with human rights by nation states. However, like the African regional instrument, the international human rights instruments, also contain derogation provisions. For instance, Article 4 of the International Covenant on Civil and Political Rights provides *inter alia* that:

In time of public emergency which threatens the life of the nation, and the existence of which is officially proclaimed, the state parties ... may take measures derogating from their obligations under the present covenant...

Article 4 of the International Covenant on Economic, Social and Cultural Rights provides similarly that:

The states parties to the present covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Again, the fact that there is no adjudicatory institution like a world court on human rights which can prosecute and/or punish individual and state violators is an omission which nearly exposes the international framework to vulnerability of helplessness.

6.4 Recommendations For Bridging The Existing Fundamental Gaps And Contributing To The Quest For A Sustainable Legal Framework For Protecting The Right To Dignity Of Women In Nigeria

This research found that the current legal framework for the protection of the rights to dignity of women and indeed human rights generally in Nigeria, comprising the constitutional guarantees, law and policy as well as judicial attitude, is weak by international standard and incapable of guaranteeing the needed protection. This research therefore makes the following recommendations for its reform based on lessons from other jurisdictions, particularly India and South Africa.

6.4.1 Recommendations For Constitutional Reform In Nigeria

To ensure sustainable protection of the right to dignity of women in Nigeria, the following recommendations for Constitutional reform are hereby suggested:

1. Enabling Political Will and Commitment to Human Rights Protection:

Without doubt, it is the compound responsibility of government and its agencies to initiate and/or facilitate steps for the promotion and protection of human rights and freedoms in any nation. Government must therefore provide the necessary political will and commitment. After all, by Article 56 of the UN Charter, all member states pledge responsibility “to take joint and separate action in cooperation with the Organization for the achievement of ‘universal’ respect for, and observance of human rights and fundamental freedom.” This can be achieved by initiating “deep constitutional reforms”⁹ and establishing the necessary institutional framework for such reform. This was the

⁹ Bertrand, J. (2015). A Review of "Constitutional Change and Democracy in Indonesia" Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia*. Cambridge: Cambridge University Press, 2013. Pp. 326. ISBNs 1107641152 and 978-1107641150. *Nationalism and Ethnic Politics*, 21(4), 493-495.

case with post-Suharto Indonesia in spite of its vast and complex ethnic divide, and being also the largest Muslim country in the world.¹⁰

- 2. Constitutional Sanctity and Exclusion from Domestication Clause of all International Human Rights Instruments:** To ensure application and enforcement of women's right to dignity and human rights generally in Nigeria, all international and regional human rights instruments, covenants, conventions and treaties should be excluded from the ambit of Section 12 of the 1999 Nigerian Constitution which requires all such treaties and instruments to be first domesticated into local legislation before they can have legal effect in Nigeria. This will enable the country to migrate from the dualist approach to the monist approach to international law in which case, all international and regional human rights instruments including the CEDAW will apply automatically as in the case of South Africa. It will also eliminate the question of parity or superiority between the Constitution and domesticated treaties, that is, municipal law and international law.
- 3. Lifting the Constitutional *Lacuna* of Non-Justiciability of Socio-Economic Rights in Section 6(6) (c):** The provision of Section 6 (6) (c) of the Constitution which place a caveat on the adjudication of negative rights listed as *Fundamental Objectives and Directive Principles of State Policy* in Chapter 2 thereof must be deleted so as to enable the Courts to adjudicate on their enforcement. The *lacuna* of Section 6(6)(c) should therefore not be permitted to operate as an "ouster" of the transformative and "*legisprudential*" power of courts as temples of justice and the last hope of the common man.

¹⁰ Horowitz, D. L. (2013). *Constitutional change and democracy in Indonesia*: Cambridge University Press.

In this way the universal human rights guaranteed in international treaties may apply in Nigeria without violation of its democratic sovereignty¹¹ and ensure the elimination of any distinction between fundamental rights (or constitutional rights) protected in municipal law and the human rights protected in international law.

4. Eliminating the Dichotomy of Rights in the Nigerian Constitution: The negative socio-economic rights contained in Chapter 2 of the Constitution should be merged with the Fundamental Rights guaranteed in chapter 4 thereof so as to make both class of rights directly justiciable as positive Fundamental Rights, as is the case in the South African Bill of Rights. The above two suggestions become necessary since Nigerian Courts have so far failed to exhibit the kind of creativity and activism common in the interpretation of fundamental rights in India whereby the Supreme Court define the negative rights in the Constitution as part of the right to life and personal liberty (Article 21) or implied positive rights without which Article 21 cannot be guaranteed. Nigerian judges may also achieve this level of activism by relying on the clear provisions of Chapter II, Section 13 of the 1999 Nigerian Constitution which provides that:

It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution.¹²

¹¹ Martha C. Nussbaum, "Sex, Laws, and Inequality: What India Can Teach the United States" *Daedalus*, Vol. 131, No. 1, On Inequality (Winter, 2002), pp. 95-106 at 103 Published by: [The MIT Press](http://www.mit.edu) Article Stable URL: <http://www.jstor.org/stable/20027741>; <https://www.amacad.org/publications/winter2002/Nussbaum.pdf> (28/10/2014).

¹² The Chapter herein referred to is Chapter II (Fundamental Objectives and directive Principles of State Policy).

- 5. Specific Provision for the Right to Psychological and Bodily Integrity and Reproductive Rights of Women:** The right to bodily integrity and reproductive rights of women should be specifically included in the fundamental rights in the 1999 Constitution. This right is already contained in Section 12 (2) of the Bill of Rights in South Africa which provides that:

Everyone has the right to bodily and psychological integrity which includes the right to (a) make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.

- 6. Amendment of Constitutional Provisions on Permissible Derogation of Fundamental Rights:** The provisions of the Nigerian Constitution Section 33 (Permissible derogations of the right to life) and Section 45 (Permissible enactment of laws which restrict or derogate fundamental rights) should be amended and replaced with non-derogation provisions which will specifically provide for the non-derogation from the right to life and the right to human dignity, even in time of national emergency, as contained in Section 37 of the South African Constitution.

Or, more realistically, limited permissible derogations should be made subject to the three-step rule of constitutional proportionality (as in Article 19 of the Indian Constitution and Section 36 of the South African Constitution) but with emphasis on a provision similar to Section 36 (1) (e) of the South African Constitution, namely, that there is no “*less restrictive means to achieve the purpose*” intended by the legislative or administrative action without a derogation of the particular fundamental right.

This suggestion is made without prejudice to the caution on the multiplier effect of derogation of rights, by Justice P.N. Bhagwati at the Bangalore Declaration thus:

We must therefore take care to ensure that in no situation, however grave it may appear, shall we allow basic human rights to be derogated from, because once there is a derogation for an apparently justifiable cause, there is always a tendency in the wielders of powers in order to perpetuate their power, to continue derogation of human rights in the name of security of the state.¹³

7. Liberalization of Right of Access and Rules of Procedure for the

Enforcement of Fundamental Rights: The right of direct access to commence action for the enforcement of fundamental rights should extend to the Supreme Court of Nigeria. The “rules of standing” or *locus standi* in Nigeria should follow the example in many common law countries such as Colombia and Costa Rica,¹⁴ Australia, Canada, England, South Africa,¹⁵ and particularly India where the rules are so liberalized that a petitioner is at liberty to present his *writ* petition for the enforcement of fundamental rights before the Supreme Court under Article 32 or the state High Courts under Article 226. Magistrate’s Courts should also be bestowed with original jurisdiction to hear cases on violation of fundamental rights since nearly every Local Government Area in Nigeria has a Magistrate’s Court, more so, the rules of procedure in Magistrate’s Courts are

¹³ P. N. Bhagwati, *Inaugural Address*, in DEVELOPING HUMAN RIGHTS JURISPRUDENCE: THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS (1988). Bhagwati’s address was given at the Judicial Colloquium in Bangalore, held February 24-26, 1988.

¹⁴ Dugard, J. (25 May, 2015). Closing the doors of justice? The South African Constitutional Court’s Approach to Direct Access Open Democracy/Open Global Rights <https://www.opendemocracy.net/openglobalrights/jackie-dugard/closing-doors-of-justice-south-african-constitutional-court%E2%80%99s-approac> (1/6/2015).

¹⁵ Taiwo, E. A. (2009). Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision. *African Human Rights Law Journal*, 9(2), 546-575.

less formal. This will reduce the gap which the absence of such access doctrines like Public Interest Litigation (PIL), and epistolary jurisdiction of Courts leaves on Nigeria's constitutionalism.

8. Public Interest Litigation/Class Action Litigation which is common in India and South Africa, should be introduced and encouraged in Nigeria: This will guarantee that even when women neglect, fail or are unable to initiate an action for violation of their right to dignity, a public-spirited individual or institution may do so on their behalf.¹⁶ The dictum of *epistolary jurisdiction of courts* will also go a long way to replace the current practice in Nigeria where courts cannot *suo motu*, initiate the enforcement of fundamental rights or grant to a petitioner a relief not sought (so as not to *descend in the arena*) what more receiving and treating private letters to the court/judge or media reports as proper petitions for the enforcement of fundamental rights. Currently, the major reference to public interest litigation in Nigeria is contained in the "preamble" to the Fundamental Rights (Enforcement Procedure) Rules, 2009. It has been argued in Chapter 3 [3.1.2.2] of this thesis that the 2009 Rules is not a proper legal document because *inter alia*, it is inconsistent with the provisions of Section 46 of the 1999 Nigerian Constitution. This *lacuna* in the Fundamental Rights (Enforcement Procedure) Rules can however, be cured by a creative, innovative, independent and activist judiciary, as has been done in India.

¹⁶ Section 38 of the Constitution of South Africa guarantees the right of access for the Enforcement of rights. The Section provides thus: "Anyone listed in this Section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are- (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members."

9. Constitutional Mandate on Courts to Apply International Law: Provision similar to Section 39 (1) (b) of the Constitution of South Africa namely, that in the interpretation of the Bill of Rights, all courts, tribunals or forum “*must apply international law*” should be replicated in the Nigerian Constitution. Also, Section 233 of the Constitution of South Africa requires a Court when interpreting legislation to “*prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*” This amendment will place international instruments, including human rights instruments above municipal law in Nigeria upon subscription and ratification thereto without first invoking the domestication of treaty clause in Section 12 of the Nigerian Constitution. This way, the judiciary and government becomes legally bound to apply, enforce and not derogate from those norms. This will finally harmonize international human rights law with municipal fundamental rights and globalize the constitutionalization and judicialization of human rights in Nigeria.

Alternatively, the Nigerian courts should apply the *due process rule of constitutional interpretation of the fundamental rights* which was popularised by Justice P.N. Bhagwati, former Chief Justice of India. This will ensure that all other fundamental rights are viewed as ancillary to the right to life which will have the consequence of an indirect application of international human rights law. Furthermore, if Nigerian Courts apply the *due process rule of interpretation*, they may give consequence to the provisions of Articles 60 and 61 of the African Charter on Human and Peoples’ Rights, which empower Nigerian Courts to draw inspiration from international and regional human rights treaties and instruments ratified by Nigeria, with the effect that all international treaties ratified but undomesticated by Nigeria becomes

enforceable contrary to section 12 of the 1999 Nigerian Constitution. Regrettably, the practical reality of Articles 60 and 61 of the African Charter is that Nigerian courts can only draw inspiration from such international treaties and instruments when their provisions are consistent with those of the 1999 Constitution. This has further reinforced the non-justiciability of the economic, social and cultural rights and further dims the right to dignity of women in Nigeria. Even the Supreme Court confirmed in *Abacha v. Fawehinmi*¹⁷ that in the event of a conflict between the African Charter and the 1999 Nigerian Constitution, the African Charter succumbs. This decision however varies with that of the African Commission which made it clear in *Constitutional Rights Project and Others v. Nigeria*,¹⁸ that municipal law must be interpreted in such manner as not to contradict any provisions of the African Charter as this will erase important rights guaranteed in the charter and thus defeat the essence of treaty making.

10. Constitutionalization or Judicialization of the Right to Legal Aid in the

Enforcement of Fundamental Rights: In Nigeria, the Legal Aid Council is empowered under the Legal Aid Act¹⁹ to render legal aid to “needy persons” charged under the Criminal Code (whether at first instance or appeal) with murder, manslaughter, assault occasioning bodily harm, malicious or wilful wounding, aiding and abetting the commission of certain crime (or their equivalent under the Penal Code) as well as civil claims in respect of accidents²⁰ but certainly not with respect to cases for the enforcement of fundamental rights including the right to human dignity. But in India, the right to free legal aid

¹⁷ (2000) 6 NWLR (PT. 660) 228

¹⁸ (2000) AHRLR 227 (ACHPR 1999)

¹⁹ Legal Aid Act (Cap L9, Laws of the Federation of Nigeria, 2004).

²⁰ See Second Schedule to the Legal Aid Act (Cap L9, Laws of the Federation of Nigeria, 2004).

generally applies to *an accused person* in a *criminal trial*, as well as a petitioner seeking justice for the violation of her right to dignity or other fundamental rights under the broad interpretation of Article 21 of the Constitution of India.

The benefit of legal aid under the Indian Constitution applies also to social action groups and voluntary organisations that render legal aid services and benefits to the deserving public, especially at the grassroots.²¹

It must be noted that the “legal aid provision” in the 1999 Nigerian Constitution, that is, section 46 (4) (b) does not enshrine “legal aid” as a positive/fundamental right but merely empowers the National Assembly to “*make provisions* for the rendering of financial assistance to any indigent citizen”²² whose fundamental right has been violated to enable him engage the services of an attorney where the “allegations of infringement of such rights are substantial and the requirement of need for financial aid is real.”

It is therefore recommended that the Nigerian Constitution be amended so that the provision of legal aid becomes a “fundamental right.” It is also conceded that the Legal Aid Act may be amended to widen the scope and increase the number of proceedings in respect of which the Legal Aid Council may provide legal aid.²³ Alternatively and more expeditiously, especially in the light of the “Nigerian factor”²⁴ among others, it is recommended that the Nigerian judiciary fills this constitutional *lacuna* by exhibiting appropriate creativity and activism in giving a new meaning to Section 46 (4) (b) of the Nigerian Constitution

²¹ *Centre for Legal Research v. State of Kerala* 3 SCJ 1986 SC 17.

²² Under Section 9 of the Legal Aid Act, only persons whose income do not exceed N1,500 (equivalent of USD 7.5 or MYR 27) per annum shall be granted legal aid. But where the person’s annual income exceeds the stated N1,500 he may get legal aid if he is willing to contribute to the funding [Section 9 (2)-(3)]. This is the level of legislative unreasonableness which is part of “the Nigerian factor” which inhibits the sustainable protection of the right to dignity of women and fundamental rights generally in Nigeria. Proverbially, this is like giving something with the left hand and taking it back with the right hand.

²³ Malemi, E. (2012). *The Nigerian Constitutional Law (With Fundamental Rights Enforcement Procedure Rules, 2009)*. Lagos: Princeton Publishing Company, at 561.

²⁴ In Nigeria, all deliberate divisive, partisan, socio-political, religious and ethnic factors and administrative bottle-necks which inhibit national development, democratic progress, unity and peace are collectively and severally derided and referred to as “The Nigerian Factor.”

thereby judicializing the right to legal aid, as it is in India. This level of judicial activism will also ensure, as in India, that the right to legal aid is not circumvented by the state on the pretext of lack of resources. The Indian Supreme Court held *inter alia*, in *Khatry v. State of Bihar*,²⁵ that the due process application of Article 39A (the equivalent of Section 46(4)(b) of the Nigerian Constitution) creates a continuing right to legal aid which attaches to the accused person from the time of his first arraignment before a magistrate up till his final appeal at the Supreme Court, and that it also creates an unqualified constitutional obligation on the state to provide the legal aid irrespective of any real or imagined administrative or financial constraints.

It is on this note that this thesis agrees with the conclusion of Ese Malemi that “the provision of a modern and comprehensive legal aid scheme by the State to assist deserving members of the public in civil and criminal matters is a social necessity in Nigeria that cannot be over-emphasised”²⁶ except to add that legal aid in Nigeria should rather be considered more as a legal necessity than a social one.

11. Constitutional Role for NGOs and like Organisations to Propagate Civic Education, Rights Advocacy and Monitor the Implementation of Human Right Protections: Without doubt, certain Nigerian socio-religious mythology and most traditional customary rites, beliefs and practices, especially in relation to women, violate basic human rights.²⁷ And being that human rights are unchangeable, inviolable, and superior to both positive law and customary

²⁵ AIR 1981 SC 928

²⁶ Malemi, E. (2012) *op.cit* at 545.

²⁷ Ojilere, A., & Gan, C. C. (2015). Learning from the Indian Judiciary: New Directions for Securing Nigerian Women’s Right to Dignity. *Asian Women*, 31(1), 81-106.

laws,²⁸ it becomes imperative that the Nigerian Constitution must create formal roles for NGOs and allied advocacy groups for the development and propagation of mass consciousness in relation to culture and human rights,²⁹ as well as for monitoring the implementation of human rights protections. Section 184(3) of the South African Constitution contains such provision³⁰ and it is imperative because in the words of Eleanor Roosevelt, ‘the destiny of Human Rights is in the hands of all our citizens and all of our communities.’³¹

12. Judicial Creativity and Activism in Redeeming inherent *Lacuna* in the

Constitutional Process for the Amendment of Chapter IV: First, it must be borne in mind that the process of amending the fundamental rights provisions contained in Chapter IV of the 1999 Nigerian Constitution is onerous and more susceptible to denied amendment than delayed amendment due to legislative laxity, diverse political interests as well as complex constitutional amendment provisions. Therefore, flowing from some of the recommendations made above with respect to making any addition to, or subtraction from the fundamental rights provisions in Nigerian Constitution, it is imperative to note that in the light of Section 9 (3) of the 1999 Nigerian Constitution, only an active and creative judiciary can provide a ready and immediate alternative for bridging the *lacuna* in the constitutional framework for protecting women’s right to dignity in Nigeria, and human rights generally.

²⁸ Achenyo, A. L. (2009). Harmonizing the Status of women and Human Rights. *Journal of Contemporary Legal Issues*, 1(1), 189-201 at 196-197.

²⁹ Ndubuisi, F. N., & Nathaniel, O. C. (2002). *Issues in Jurisprudence and Principles of Human Rights*. Lagos, Nigeria: Dmodus Publishers, p. 181. It is good to mention that at least one author has suggested that the National gender Policy of Nigeria should be enshrined in the 1999 Nigerian Constitution and that Nigeria should follow the example of Rwanda where Article 187 of the 2003 Constitution additionally constitutionalized the National Women Council. See Okonkwo, U. U. (2013). Gender Question and National Policy in Nigeria: Historical Analysis. *Kaduna Journal of Sociology (KJS)*, 1(1), 278-287, especially pp. 284-284.

³⁰ The Section provides that: “Each year, the South African Human Rights Commission must require relevant organs of state to provide the commission with information on the measures they have taken towards the realization of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment.”

³¹ Eleanor Roosevelt (wife of Franklin D. Roosevelt, Democrat and 32nd President of the United States of America), Chairperson of the UN Commission on Human Rights who drafted the Universal Declaration of Human Rights, 1948: Introduction to Human Rights, USIA, 1998, p.1, cited in Ese Malemi, op. cit at 151.

The said Section 9 (3) of the Nigerian Constitution provides that:

An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third of all States.

First, it must be noted that Nigeria is a multi-party democracy and the National Assembly is Nigeria's bicameral legislature and the highest elective law-making body of the country. It consists of the 109-member Senate and the 360-member House of Representatives.³²

Second, the term of the National Assembly is 4-years from the date of its first sitting after the general elections. The immediate past 7th National Assembly (2011-2015) was inaugurated on 6th June, 2011. Out of the 109 Senators of the Senate, 36 were re-elected while 73 were elected for the first time. Out of the 360 members of the House of Representatives, 100 were re-elected while 260 were elected for the first time.³³

Third, Nigeria is made up of 36 states³⁴ which invariably translate into 36 State Houses of Assembly. The number of legislators in a particular State House of Assembly depends on the number of Local Government Areas in the particular state of the federation, and Nigeria has 774 local government areas (including six area councils).³⁵

³² The National Assembly, Federal Republic of Nigeria. <http://www.nassnig.org/#> (16/4/2015).

³³ The National Assembly, Federal Republic of Nigeria, *ibid*.

³⁴ See Section 3 (1) of the 1999 Constitution.

³⁵ Section 3 (6) of the Nigerian Constitution; See First Schedule to Section 3 Part 1 of the 1999 Nigerian Constitution.

From the above statistics *vis-à-vis* the pre-conditions in Section 9 (3), it simply means that an Act of the National Assembly for the amendment of the fundamental rights provision in Chapter IV of the Nigerian Constitution shall not be passed in either house of the National Assembly without the support of at least 87 of the 109 members of the Senate, 288 of the 360 members of the House of Representatives and a resolution passed by the Houses of Assembly of at least 24 of the 36 states of the federation. This is almost an impossible target to meet considering “The Nigeria Factor.” Similar inherent constitution-amendment controversies and ambiguity necessitated the plausible suggestion by Nat Ofo³⁶ that any reasonable constitutional amendment in Nigeria must include ‘the amendment of the amendment-provisions’ of the Constitution itself.

13. Constitutional Provision for a Uniform Civil Code: Due to absence of a Uniform Civil Code (UCC), women’s dignity is routinely exploited in the name of personal laws under certain customary laws and religions.³⁷ And since customary/religious laws operate alongside the civil law in Nigeria, most women tend to accept their fate as appendages to men in society and therefore not entitled to any more honour or rights than *men* and *society* would voluntarily offer them. It is therefore recommended that a provision similar to Article 44 of the Indian Constitution be included in the Nigerian Constitution. The said Article 44 provides that: *‘The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.’* This will ensure that customary practices, patriarchy and other socio-religious mythologies which demean women are diluted and rendered non-compelling, especially for

³⁶ Ofo, N. (2011). Amending the Constitution of the Federal Republic of Nigeria 1999. *African Journal of Legal Studies*, 4(2), 123-148.

³⁷ GY, N. (2015). Legal Status of Women in India—Then and Now-A Macro Study. *Journal of Legal Analysis and Research*, 2(1), 90-103 at 98.

unwilling adherents. This is without prejudice to Epiphany Azinge's belief that the Codification of customary law is "a mission impossible"³⁸

6.4.2 Recommendations For Law And Policy Reform In Nigeria

The following recommendations are suggested to bridge the gaps and strengthen the Nigerian legislative and policy framework for the protection of women's right to dignity, including their sexual independence.

1. Elaborate National Legislation on Domestic Violence: The absence of a national legislation on domestic violence in Nigeria remains the bane of protecting women's right to dignity in the country. It is therefore recommended that the Nigerian National Assembly should proactively make an elaborate legislation against domestic violence in Nigeria, as is the case in India and South Africa. This proposed legislation should be elaborate enough to criminalize all forms and manners of domestic violence against women, whether rooted in patriarchy, customary law generally or socio-religious mythology. This will provide a positive legislative basis for the criminalization and judicialization of domestic violence at home, at the workplace or open space. It will also remove common dehumanising acts such as marital rape, son-preference, widow-inheritance, widowhood rites and wife donation from the realm of "domestic wrongs" or "family matters" into the domain of public law (criminal law).

2. Legislation to Protect the Right to Dignity and Sexual Independence of Disabled Women: With regards to protecting the right to dignity of women with disabilities and special needs, a legislation/legislative amendment similar to

³⁸ Azinge, E. (1991). Codification of customary law—A mission impossible. *Towards a Restatement of Nigeria Customary Law: Lagos, Federal Ministry of Justice.*

Section 376(2) of the Indian Penal Code pursuant to the Criminal Law (Amendment) Act 2013 should be enacted. Such amendment will not only increase punishment for rape and sexual violations of women and girls with physical and mental disabilities, it will also provide for the compulsory employment of special educators and interpreters to work at all police stations, hospitals and courts who shall be present from the time of recording the complaint of the violated disabled woman or girl by the police up till the time of her medical examination and at the criminal trial of the violator in court. This will bridge the legislative gap in the protection to the dignity of disabled women and take care of the kind of situation which arose in an Indian case where Superintendent of Police Pranab Kumar was reported to have said that, ‘it is difficult for us to investigate because the victim is deaf and dumb and we need an interpreter.’³⁹

- 3. Education, Civic Education and Public Enlightenment:** Education carries the advantage of enlightenment and empowers women against most trade-cultural mythology and retrogressive customary practices and rites which demean their dignity. This underscores the necessity of making ESC Right to education justiciable either directly or by implication as this will reduce the incidence of many young Nigerian girls who are forced into marriages when they should be in schools.⁴⁰ Such proper education will also enhance women’s ability to access media or other formal public information regarding solutions and best practices to their plight of abuse. Proper education will also create awareness particularly

³⁹ (http://www.firstpost.com/india/physically-disabled-teenager-raped-in-kolkata229315.html?utm_source=ref_article); cited in Badjena, S. S. (2014). Sexual Violence Against Women with Disabilities and the Legislative Measures in India. *ODISHA REVIEW* (April-May 2014), 46-57, esp 47-48.

⁴⁰ Adefi, O. M. (2009). Cultural Practices and Traditional Beliefs as Impediments To The Enjoyment of Women’s Rights in Nigeria *Journal of Contemporary Legal Issues*, 1(1), 117-131.

in rural areas to break common societal barriers of silence and timidity, which veil women from reporting and seeking justice against violations.

4. Incorporating Gender Studies and Gender Mainstreaming into School

Curricula: Gender is not a synonym of ‘women’. It rather covers both male and female. Gender studies therefore educates on the interrelatedness of men with women in spite of their different biological sexes.

The United Nations Development Program (UNDP) defines ‘gender mainstreaming’ as ‘taking account of gender equality concerns in all policy, programme, administrative and financial activities, and in organisational procedures, thereby contributing to organisational transformation’.⁴¹ Simply put, gender mainstreaming implies bringing the outcome of gendered socio-economic and policy analysis into every facet of decision-making. It involves the ‘inclusion’ of women but not the ‘exclusion’ of men, and it promotes equal co-operation, opportunities and protection.

ECOSOC defines ‘gender mainstreaming’ *inter alia*, as “a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of the policies and programmes in all political, economic and societal spheres so that women and men benefit equally, and inequality is not perpetuated.”⁴² This is possible because gender mainstreaming usually seeks to change or influence public perception of gender values and allied factors such as mind-sets, generalizations,

⁴¹ See The UN Gender Theme Group, Nigeria (2013). Gender Equality Briefing Kit. Nigeria: The United Nations System in Nigeria, p. 2. http://www.ng.undp.org/content/dam/nigeria/docs/IclusiveGrwth/UNDP_NG_inclusiveGrwth_Gender-Briefing-Kit230513.pdf (12/5/2015).

⁴² E.1997.L.30.Para.4. Adopted by ECOSOC 17.7.97 (Cited at page 2 of The UN Gender Theme Group, N. (2013). Gender Equality Briefing Kit. Nigeria: The United Nations System in Nigeria). http://www.ng.undp.org/content/dam/nigeria/docs/IclusiveGrwth/UNDP_NG_inclusiveGrwth_Gender-Briefing-Kit230513.pdf (12/5/2015).

stereotypes and deep-rooted socio-religious customs and traditional practices which encourage discrimination, subordination and subjugation of women.⁴³

This thesis concedes that the culture of violence is not one that can be changed overnight and that the desire for education is something that unites many Nigerians, regardless of ethnicity, class or religion. Consequently, tackling violence in schools and educational establishments represents a strategic first step towards eliminating violence against women.⁴⁴

It is also reasonable to hold that teaching ‘Gender Studies and Gender Mainstreaming’ as compulsory subjects in secondary schools and tertiary institutions in Nigeria will facilitate a process of early appreciation of the importance of women as equal members of society as against the patriarchal mind-set (often arising from age-long beliefs in certain customary law and socio-religious mythology) which consider women as an ‘appendage’ or ‘addendum’ to men⁴⁵ and often times affect government delivery of women’s rights law and policy. It will also build into the youth the understanding that private and public violators of women’s rights, including the government, must be held accountable for any violation or neglect to protect or promote programmes and policies in favour of the right to dignity of women among others. To be most effective however, such a campaign must involve the coalition of local communities, civil society, NGOs, government and educationists.⁴⁶

⁴³ The UN Gender Theme Group, Nigeria (2013), op. cit. at 5.

⁴⁴ British Council, N. (2012). Gender in Nigeria Report 2012: Improving the Lives of Girls and Women in Nigeria- Issues, Policies, Action (2nd ed.). British Council, Nigeria: Department of International Development, British Council Nigeria, at 61. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67333/Gender-Nigeria2012.pdf (22/5/2015).

⁴⁵ Ojilere, A., & Gan, C. C. (2015). Learning from the Indian Judiciary: New Directions for Securing Nigerian Women’s Right to Dignity. *Asian Women*, 31(1), 81-106, especially at 86-87.

⁴⁶ British Council, N. (2012). Gender in Nigeria Report 2012, *ibid*.

5. Economic Empowerment Programs for Women: Women's ability to command respect should also be enhanced by economic empowerment. This is imperative because statistics show that the efforts of Federal Ministry of Women Affairs and Social Development in skills acquisition training programs have not been of great assistance as 58.7% of trained women acquired skills without having or getting a take-off capital and therefore, leaving them unable to use the acquired skills.⁴⁷ Unfortunately, the current plight of Nigerian women is not so different from what it was in 1999 when the DFID reported that, "the consequences of being a Nigerian woman include deprived opportunities, limited coping strategies and safety nets and a constant threat of insecurity."⁴⁸ In India, the government launched the Bharatiya Mahila Bank to provide financial and credit services predominantly to women and women self-help groups as a deliberate policy to promote economic justice and empowerment of women and to broaden the social base for their dignity, integrity and development.⁴⁹

The bank has been described as "the beginning of a unique new institution" and "a small step towards economic empowerment of our women"⁵⁰ which will help women overcome gender-specific problems of lack of access to credit capital due to inherent difficulty in furnishing collateral because family property are usually not registered in their names.⁵¹ This is a realistic example which the Nigerian government may reasonably follow.

⁴⁷ The Nigerian NGO CEDAW Coalition: A Shadow Report (2008) 26

⁴⁸ A R. Oyeduntan (2003) 'Unemployment, Poverty and Drug dependency among Youths in Nigeria' A paper presented at the Conference on 'Policy and Politics in a Globalising World, University of Bristol, UK.

⁴⁹ The BMB has an all-woman, eight member board.

http://zeenews.india.com/business/news/economy/bharatiya-mahila-bank-for-economic-empowerment-of-women-pm_89058.html (25/11/2013).

⁵⁰ See Prime Minister's remark, *Ibid.*

⁵¹ *Ibid.* See remark by India's Finance Minister P. Chidambaram at the launching of the bank.

6. Government Must Show Decisive Commitment to Reform: Government must also demonstrate positive commitment by law and policy, including fiscal and gender-sensitive budgeting and administrative policies⁵² to guarantee that women's rights issues are not treated as mere social benefits or privileges but genuine fundamental rights which must be protected by domestic law and as an obligation under international law. In this regard, government should make gender-specific legislation against marital rape and violence against women including dehumanizing cultural practices and widowhood rights. The criminal jurisprudence should also be amended in line with the Criminal Law (Amendment) Act, 2013 of India, to create such sexual offences as voyeurism, stalking, sexual harassment and disrobing. This is necessary because most acts in violation of women's dignity are either gender-specific or affect them disproportionately. This explains why the CEDAW was made in spite of the existing gender neutral protections guaranteed by the UDHR. It also explains the necessity for the Women's Protocol to the African Charter in spite of general human rights protections under the African Charter. It further reinforces the argument of Pieterse Marius⁵³ that *rights* such as the "right to dignity of *women*" must be asserted because "rights are powerful and empowering. They enable individuals and marginalised groups within society to assert themselves against powerful entities in the public and private spheres and, thereby, to draw societal attention to their plight." *Rights* therefore help to establish a definite "claim" over/to what is being asserted "as moral and legal imperatives, rather than 'mere' [appeal] or cries for help" and accordingly impact on the manner in

⁵² Policies usually show a committed intention to protect human rights but their unenforceability is a source of great concern. Laws are therefore preferred to policies because they carry penal sanctions against violators any may act as watchdogs against unreasonable governments.

⁵³ Pieterse, M. (2014). *Can Rights Cure? The impact of human rights litigation on South Africa's health system*. Faculty of Law, University of Pretoria, South Africa: Pretoria University Law Press (PULP).

which society views delivery of such rights and demand accountability from those responsible for this delivery.⁵⁴

7. Acts of Domestic Violence Must Not Be Treated as “*Family Affair*”: Every violation of the right to dignity of women and all acts of domestic violence against women including spousal rape must be treated as “public crimes” and not “private or family affairs”. This will compel the potential violators to be more cautious knowing that they may be prosecuted and be convicted if the matter is reported to the police. This will also discourage marital rape and sexual domination of women which are often induced by the patriarchal mind-set and attitude of subordination and domination of women, and fuelled by the cultural belief in *chattelization* and *wife ownership* arising from the mandatory payment of bride price in marriage.⁵⁵ It will also ensure that general pertinent issues relating to women’s dignity are removed from the mercy of the patriarchal order and placed on the principle of law.⁵⁶ It shall be the legislative responsibility of the Nigerian National Assembly, or the Houses of Assembly of the various states of the federation to make necessary legislative amendments to this effect. This thesis notes however, that it is a popular belief among most African men that wife submission to a husband is an ancient African way of life which have worked so well in many African societies until the introduction of Western civilization, which has rocked many African values, leading to conflicts in homes and values.

⁵⁴ Pieterse, M. (2014). Can Rights Cure? The impact of human rights litigation on South Africa’s health system, *ibid*.

⁵⁵ Gray, R. F. (1960). Sonjo Bride-Price and the Question of African “Wife Purchase” 1. *American Anthropologist*, 62(1), 34-57.

⁵⁶ Erhun, M. O. (2013). An Appraisal of the Protection of Women's Rights under Nigerian Laws. In R. I. Ako-Nai (Ed.), *Gender and Power Relations in Nigeria* (pp. 61-76). Plymouth, UK: Lexington Books at 73.

8. Domestication of the CEDAW and African Union Protocol on the Rights of

Women in Africa: The National Assembly should domesticate CEDAW and the Women Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa by urgently passing into law, the Gender and Equal Opportunities Bill.⁵⁷ Government should thereafter take decisive steps to implement them as this will invariably facilitate the implementation of the National Gender Policy, 2006.

9. Greater Emphasis and Support for Women's Rights NGOs and Allied

Activism: Recent studies have shown that (1) the existence of justiciable legal frameworks for the protection of human rights do in fact, promote the realisation of human rights in "low quality democracies" like Nigeria, (2) that judicial activism and access to support structures for legal mobilisation are important preconditions for a justiciable legal framework to contribute to the realisation of human rights through courts and (3) that political mobilisation can play a very important role in creating a broader political climate favourable to judicial activism and policy change.⁵⁸ It is therefore recommended that government should place emphasis on support and capacity building to enable relevant NGOs to carry out these and other activities related to women's rights generally. At least one author even suggested that Nigeria's National Gender Policy should be enshrined in the Constitution and that Nigeria should follow the example of Rwanda where the National Women Council was constitutionalized in Article 187 of the Rwanda Constitution, 2003.⁵⁹

⁵⁷ British Council, Nigeria (2012). Gender in Nigeria Report 2012: Improving the Lives of Girls and Women in Nigeria- Issues, Policies, Action (2nd ed.) See p. viii of the Executive Summary. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67333/Gender-Nigeria2012.pdf (12/5/2015).

⁵⁸ Rosser, A. (2015). Realising Rights in Low Quality Democracies: Instructive Asian Cases. *Asian Studies Review*, 39(2), 180-193; Rosser, A. (2015). Law and the realisation of human rights: Insights from Indonesia's education sector. *Asian Studies Review*, 39(2), 194-212.

⁵⁹ Okonkwo, U. U. (2013). Gender Question and National Policy in Nigeria: Historical Analysis. *Kaduna Journal of Sociology (KJS)*, 1(1), 278-287, especially pp. 283-284.

10. Monitoring Systems and Institutions: Monitoring systems and institutions should be set up to assist, partner with, and complement relevant NGOs in all aspects of the protection of women's right to dignity including case reporting, litigation and legal aid, victim psycho-medical assistance and rehabilitation. Currently, there is no such monitoring system and public institutions.

11. Extensive Capacity Building on Statistical Data on Gender and Domestic

Violence Issues: The building of extensive capacity on gender statistics for the effective collation, analysis and application of results of new and any existing data on gender violence will help relevant agencies to investigate and determine the patterns and dynamics of violations against women in Nigeria. For instance, a recent study reveals that: (i) notwithstanding international and regional concerns to promote gender equality, African countries remain generally poor on gender statistics, (ii) advancing the goals of gender statistics in Nigeria is a prime agenda for its development, (iii) relevant sectors and agencies mandated to provide leadership for the production and use of gender statistics in Nigeria lack basic technical competencies and show very little commitment to the engendering process, (iv) production and access to gender statistics is still plagued by misunderstanding of the concept of gender as a planning tool, especially in the non-traditional sectors which have remained the domain of men.⁶⁰

12. Uniform Code of Customary Law (UCCL): This researcher also agrees with the general suggestion made by another author on “the need to re-examine both the customary and statutory laws to reflect justice, dignity and fair play for all

⁶⁰ Omoluabi, E., Aina, O. I., & Attanasso, M. O. (2014). Gender in Nigeria's development discourse: relevance of gender statistics. *African Population Studies*, 27(2s), 372-385.

members of the society irrespective of their gender.”⁶¹ Similarly, this research further recommends that the Nigerian Parliament should ensure the promulgation of a Uniform Code of Customary Law for each of the three dominant Nigerian tribes which will also apply to the smaller tribes within each dominant region.

13. Collaboration with Leaders of Religious and Faith-Based Institutions: Most religions promote gender equality, non-discrimination, mutual and peaceful co-existence among members in the African and American society.⁶² Most religious leaders have overbearing influence as “the conscience” of their followers. Religious leaders, therefore, have the force to promote the eradication of sexual and gender based values in human society.⁶³ It has even been said that the socio-religious responsibility of these religious leaders is so decisive that it is practically impossible to win the war against sexual and gender based violence in any modern civilization without them.⁶⁴ Collaboration with both religious and traditional leaders should therefore be encouraged by government at various levels. This will enhance open and honest discussions on the proper place and status which women ought to enjoy in a civilized society, especially with respect to their dignity and sexual independence.⁶⁵

⁶¹ Ozo-Eson, P. I. (2008). "Law, Women and Health in Nigeria." *Journal of International Women's Studies* 9(3). P.285.

⁶² Ushe, U. M. (2015). Eradicating Sexual Abuse and Gender Based Violence in Africa and America: Role of Religious Leaders. *European Scientific Journal*, 11(5), 99-116.

⁶³ Ushe, U. M. (2015). Eradicating Sexual Abuse and Gender Based Violence in Africa and America: Role of Religious Leaders. *European Scientific Journal*, 11(5), 99-116, *ibid*.

⁶⁴ Agbasiere, J.T. (2000). *Women in Igbo Life and Thought*. London: NY: Routeledge (cited in Ushe, U. M. (2015) *op.cit*.

⁶⁵ Ushe, U. M. (2015). *Ibid*

6.4.3 Recommendations For Judicial Reform For Creativity And Activism In Nigeria

Generally, and without prejudice to all the recommendations made above, the researcher most humbly submits that a creative and activist Nigerian judiciary, particularly, the Supreme Court of Nigeria, is capable of providing an immediate remedy, albeit interim, to bridge any dire constitutional, legislative or policy *lacuna* in the protection of women's right to dignity, for instance, by giving broad and inclusive interpretation of fundamental rights to include rights contained in the directive principles of state policy "without which life is meaningless" as has been effectively done in India.⁶⁶ Such judicial activism will thereby underscore the essence of judicial review which, according to Thaksala Udayanganie⁶⁷ is to uphold the "principles of good administration" in which case the 'requirement of "fairness" is used in its broadest form to cover the constitutional and statutory gaps, prohibition of the fettering or delegation of discretion, abuse of power, arbitrariness, capriciousness, unreasonableness, bad faith, breach of accepted legal and moral standards and so on.

It is also recommended that the Nigerian Supreme Court should always give a liberal, consistent and inclusive definition, interpretation and application of the doctrine of *locus standi* in all cases of fundamental rights enforcement including the right to dignity of women. This will resolve the current inconsistency whereby some judges follow the narrow or restrictive approach to *locus standi* applied by the Nigerian Supreme Court in two prominent cases: *Adesanya v. President of the Federal Republic of Nigeria*⁶⁸ and *Olawoyin v. Attorney-General of Northern Nigeria*⁶⁹ while others follow the liberal

⁶⁶ For instance in *Mukti Morcha v. Union of India (The Bonded Labour Case)*, (1984) 3 SCC 161, the Court observed that the right to live with human dignity enshrined in Article 21 of the Constitution 'derives its life breath from the Directive Principles of State Policy.'

⁶⁷ Udayanganie, U. T. (2014). "Expanding the Scope of Judicial Review using Constitutional Interpretation in Sri Lanka: A Comparative Study of the Development of Judicial Review in UK." *Journal of Law and Social Sciences (JLSS)* 3(1).

⁶⁸ (1981) All NLR 1 SC

⁶⁹ (1961) 2 SCNLR 5. This restrictive application of *locus standi* has been followed in several other cases including *Thomas v. Olufosoye* (1986) 1 NWLR Part 18, p.669 SC; *Chuba Egolum v. Olusegun Obasanjo* (1999) 7 NWLR Part 611, p. 355; *Keyamo v.*

approach applied by the same court in the latter *locus classicus* of *Fawehinmi v. Akilu & Anor*.⁷⁰ The fact that the Supreme Court in *Fawehinmi's case* did not overrule *Adesanya* remains a dilemma to constitutionalism of women's right to dignity in Nigeria because over the years, however, the courts have tended more to apply the decision in *Adesanya's case*.⁷¹

To actualize this level of judicial liberality, it is further recommended that continuing legal education of judges and judicial office personnel should be encouraged with emphasis on the essence of doing "substantial justice", especially with respect to promoting and protecting human rights generally, and the right to dignity of women in particular.

Relatedly, Nigerian courts should exhibit activism in applying the doctrine of *stare decisis*, especially with respect to "unpopular" decisions of higher courts which restrict liberal enforcement of fundamental rights, such as the above cited restrictive-*locus standi* cases of *Adesanya v. President of the Federal Republic of Nigeria* and *Olawoyin v. Attorney-General of Northern Nigeria*. After all, according to some scholars, what's law got to do with justice?⁷²

6.4.4 Challenges Imminent to Implementing the Recommendations

The implementation of these recommendations in Nigeria may be hindered or obstructed by a number of challenges. These challenges typically derive from common factors such as age-long beliefs in customary law and socio-religious mythology, patriarchy, ethnicity and partisan political differences, corruption, inherent hiccups in the 1999 Nigerian Constitution, lack of political will, lack of pro-active legislature,

Lagos State House of Assembly (2000) 12 NWLR Part 680, p.196 CA; *Fawehinmi v. Inspector General of Police* (2002) 7 NWLR Part 767, p.606 SC. But this is not so with the application of Public Interest Litigation/Class Action Litigations in South Africa and India as well as the doctrine of epistolary jurisdiction of courts in India.

⁷⁰ (1987) 1 NWLR Part 67, p.797 SC.

⁷¹ Malemi, E. (2012). *The Nigerian Constitutional Law (With Fundamental Rights Enforcement Procedure Rules, 2009)*. Lagos: Princeton Publishing Company, pp. 501-502 at 511.

⁷² Sircar, O., & Mandal, S. (2013). What's law got to do with justice? *Infochange Agenda*, March (26), 2-6.

judicial timidity, lack of judicial courage, creativity and activism in the interpretation of constitutional provisions on fundamental rights and directive principles, as well as rural poverty, high female illiteracy, and inadequate political representation of women in the Nigerian Legislature. The omnibus *Nigerian Factor*, that is, negative tribal/ethnic bias, socio-political affiliations, and/or other administrative hiccups deliberately placed against service-delivery in the Nigerian public sector, may also threaten or hinder implementation of these recommendations. This thesis examines the commonest of these challenges in three broad heads, namely, socio-cultural and religious, political and administrative, and legal (constitutional, judicial and legislative).

6.4.4.1 Socio-Cultural and Religious Challenges

(a) Illiteracy, Ignorance and Poverty: These are commonest among women and girls in rural areas of Nigeria,⁷³ hence, most of them cannot read or understand printed information on human rights protection and best practices, even in relation to public health and reproductive rights which are core to their dignity. Ignorance set them apart from simple knowledge of their dignity rights, especially with regards to domestic violence, marital rape, customary law and socio-religious mythology.⁷⁴ Due to poverty, most women cannot afford the cost of litigation to redress violation of their rights.⁷⁵

In addition to high rate of female illiteracy, household poverty and early marriage may also inhibit the implementation of recommendations for the protection of women's right to dignity in Nigeria.⁷⁶ Scholars have also cited lack of education and unique family and religious practices as significant cumulative inhibitions to the fight against girl-child

⁷³ Olajide, O. E. (2014). Predictors of Women Violence and Abuse among Rural Communities' women in Akinyele Local Government Area of Oyo State, Nigeria. *African Journal for the Psychological Studies of Social Issues*, 16(2), 230-237; Agbakwa, S. C. (2014). Reclaiming humanity: economic, social, and cultural rights as the cornerstone of African human rights. *Yale Human Rights and Development Journal*, 5(1), 5.

⁷⁴ Ojilere, A., & Gan, C. C. (2015). Learning from the Indian Judiciary. *Asian Women*, 31(1), 81-106.

⁷⁵ Ojilere, A. (2008). The Customary Law and Socio-religious Mythology on the Rights of Women in Nigeria. *Nigerian Journal of Public Law (NJPL)*, 1(1), 257-266. Faculty of Law, University of Nigeria, Enugu campus.

⁷⁶ Fapohunda, T. M. (2012). Women and the Informal Sector in Nigeria: Implications for Development. *British Journal of Arts and Social Sciences*, 4(1), 35-45.

marriage (GCM), especially, as the relationship of national laws that prohibit child marriage with the prevalence of child marriage and adolescent birth is not well understood in Nigeria.⁷⁷

(b) Patriarchy and Allied Obstacles: Patriarchy and its multiplier effects remain serious threats to the participation of women, on equal terms with men, in political, social, economic, and cultural life in Nigeria.⁷⁸ At marriage a woman surrenders to her husband exclusive sexual rights and obedience,⁷⁹ and this often perpetuates wife *ownership*, wife *chastisement* and other acts of domestic violence. According to Gloria Ngozi Egbue,

Violence against women constitutes a highly damaging dimension of the dehumanization of women on basis of culture. This still remains common practice in the localities studied, either as means of maintaining masculinity and male superiority, or of keeping female spouse in check.⁸⁰

(c) Institutionalization of Obnoxious and Discriminatory Cultural Practices: The dogged belief in some obnoxious customs and practices may threaten vital recommendations for promoting equality in dignity and rights of women in Nigeria. Some of these practices are rooted in ancient cultures and mythologies inherited from generations of ancestors dating back to time immemorial,⁸¹ and therefore, considered sacred and inviolable, even by law. They include traditional widowhood rites and

⁷⁷ Maswikwa, B., Richter, L., Kaufman, J., & Nandi, A. (2015). Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: Evidence from Sub-Saharan Africa. *International perspectives on sexual and reproductive health*, 41(2), 58-68.

⁷⁸ Oluyemo, C. A., & Ola, T. M. (2014). The Rights of Nigerian Women in a Patriarchal Society: Implication for Development. *Journal of Research in Gender Studies*, (2), 373-387.

⁷⁹ Oyediran, K. A., & Isiugo-Abanihe, U. C. (2005). Perceptions of Nigerian women on domestic violence: Evidence from 2003 Nigeria Demographic and Health Survey. *African journal of reproductive health*, 38-53.

⁸⁰ Egbue N.G, (2005). "Culture Issues in Women's Human Rights among the Igbos of Southern Nigeria: An Appraisal of their Implications to Women Development in Nigeria", *International Journal of Forum for African Women Educationalists in Nigeria*, 1(3), 214.

⁸¹ Chika, I. S., & Nneka, U. (2014). Discriminatory Cultural Practices and Women's Rights among the Igbos of South-East Nigeria: A Critique. *Journal of law, policy and globalization*, 25, 18-27.

payment of bride-price which continually give most men the false impression of powers of ownership over their wives, and which some women grew up to accept as normal.⁸²

Religious and customary laws pose formidable obstacles to women's full enjoyment of human rights.⁸³ Although it has been rightly stated that domestic violence against women is a social problem with no tribal distinction in Nigeria,⁸⁴ Sharia is yet considered a major obstacle to the implementation of laws and programmes for the guarantee of women's right to dignity.⁸⁵ Under customary law, the headship of the man over his wife and children is non-negotiable and considered an unchangeable divine injunction which must remain in the domestic domain of the family, and away from any manner of constitutional or legal interference.⁸⁶ This will certainly obstruct any quest for equality in dignity and rights of women and girls in Nigeria, in spite of any transformative recommendation.

6.4.4.2 Political and Administrative Challenges

(a) Executive Lawlessness and Disobedience to Court: Executive lawlessness and disobedience to court orders threaten and diminish the authority and integrity of Court.⁸⁷ This can undermine any progressive recommendations for the sustainable protection and promotion of women's right to dignity, and fundamental rights generally, bearing in mind that all law enforcement agencies in Nigeria belong to the executive arm of

⁸² Chika, I. S., & Nneka, U. (2014). Discriminatory Cultural Practices and Women's Rights among the Igbos of South-East Nigeria: A Critique, *ibid*.

⁸³ Adamu, F. L., & Para-Mallam, O. J. (2012). The role of religion in women's campaigns for legal reform in Nigeria. *Development in Practice*, 22(5-6), 803-818.

⁸⁴ Oyekale, A. S. (2014). Ethnic Characterization of Gender-Inequality and Domestic Violence against Women of Reproductive Ages in Nigeria. *Studies of Tribes and Tribals*, 12(1), 31-41.

⁸⁵ Ezeilo, J. (2014). Feminism and Islamic fundamentalism: Some perspectives from Nigeria and beyond. *Signs*, 40(1).

⁸⁶ Quraishi, A. (2011). What if Sharia Weren't the Enemy: Rethinking International Women's Rights Advocacy on Islamic Law, *Colum. J. Gender & L.*, 22, 173.

⁸⁷ The Supreme Court of Nigeria lamented the grave human rights consequences of executive disobedience to court orders in the celebrated case of *Governor of Lagos State v. Ojukwu*, [1986] 1 NWLR 621.

government, and Section 5 of the 1999 Nigerian Constitution expressly confers on it the power to enforce law.⁸⁸

Certainly, it is one thing for a court to grant remedy for fundamental rights violation and quite another for the petitioner to reap the fruits of his judgment because the court lacks the mechanism to enforce its own orders. According to Jacob Dada,

[Even] in limited cases where right of access existed and the judiciary was willing to demonstrate judicial activism, enjoyment, protection, and promotion of human rights were further hampered by incidences of disobedience to court orders.”⁸⁹

(b) Political or Executive Corruption: Corruption induced by municipal and foreign economic and political interests may also obstruct the quest for a sustainable legal framework for the protection of women’s right to dignity, both in Nigeria and elsewhere. Kempe Ronald Hope, Sr. wrote in his “Corruption and Development in Africa” that:

The corruption problem in Africa reflects the more general, and now legendary, climate of unethical leadership and bad governance found throughout most of the continent. The pandemic of corruption in Africa, and its extremely negative impact on socioeconomic development and the fight against poverty in the region, have become matters of global concern.⁹⁰

Sometimes too, foreign interests and transnational corporations (TNC) contribute to this challenge. According to Menno T. Kamminga,

⁸⁸ Chapter 1, Part 2, Section 5(1) of the Constitution vests the executive power of the Federation on the President while Section 5(2) vests the executive powers of a State on the Governor.

⁸⁹ Dada, J. A. (2012). Impediments to human rights protection in Nigeria. *Ann. Surv. Int'l & Comp. L.*, 18, 67, citing Nnamdi J. Aduba (1999) “The Protection of Human Rights in Nigeria” in A. **Obilade**, C. **Nwankwo** and A. Tunde – Olowu (eds) (1999). Text for Human Rights Teaching in Schools. *Constitutional Rights Project*, Lagos, 1999, p.109 at 137.

⁹⁰ Ronald Hope Sr, K. (2000). “Corruption and Development in Africa” in Ayittey, G. B. (2000). *Combating corruption in Africa: analysis and context* (pp. pp-104). London: Macmillan Press., p.17.

It must be acknowledged at the outset that foreign direct investment injected by TNCs into developed and developing countries alike can and does bring jobs, capital, and technology, and thereby protects and promotes the rights to work and to adequate living standards, along with such derivative rights as health, education, housing, and even political freedoms. That said, it is equally certain that human rights abuses by TNCs do occur, and do so frequently in the sphere of economic, social, and cultural rights.⁹¹

(c) Inadequate Political Participation and Under-Representation of Women in the Legislature. Unless affirmative action is applied reserving at least 30% of all elective legislative positions to women, both at the States Assembly and National Assembly (which will enable women to sufficiently place issues which are particular to them on the national agenda rather than abandoning it to the whims and caprices of male legislators who would simply consider them as social or infrastructural issues), women's rights issues will continue to take the back bench in government.⁹² Certainly, this will pose a serious challenge to the recommendations for equality in rights and dignity for women. A legislature with one-third female membership will ensure that gender violence and allied acts violative of women's dignity, are rightly treated as human rights and public health issues within the sustainable legal and national development framework.⁹³

6.4.4.3 Legal (Constitutional, Legislative and Judicial) Challenges

Serious legal challenges may also arise from inherent constitutional lapses, judicial and legislative corruption, timidity and lack of courage, among others.

⁹¹ Kamminga, M. T. (1999). *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, in THE EU AND HUMAN RIGHTS 553, 554 (Philip Alston ed., 1999); Kamminga, M. T. (2014). Challenges in International Human Rights Law. *Challenges in International Human Rights Law*, Ashgate.

⁹² Agbalajobi, D. T. (2010). Women's participation and the political process in Nigeria: Problems and prospects. *African Journal of Political Science and International Relations*, 4(2), 075-082.

⁹³ Bunch, C., & Carrillo, R. (1991). Gender Violence: A Development and Human Rights Issue.

(a) Constitutional Primacy of Municipal Law over International Law: Section 12 of the Constitution of the Federal Republic of Nigeria, 1999 provides that:

- (i) No treaty between the Federation and any other country shall have force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.
- (ii) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

It is a basic principle of international law of treaties that a state cannot be bound by any agreement unless it has consent thereto, by ratification, signature, accession or any other means of declaration of intent to be so bound. Most treaties also do not take automatic effect, hence, state parties are usually enjoined to take necessary local steps to guarantee their municipal application.

The Supreme Court of Nigeria amplified this provision when it held, *inter alia*, in *Sani Abacha v. Gani Fawehinmi*,⁹⁴ that:

Unincorporated treaties cannot change any aspect of Nigerian law even though Nigeria is a party to those treaties...Constitution is the supreme law of the land; it is the grundnorm. Its supremacy has never been called to question in ordinary circumstance.⁹⁵

Generally, the primacy of municipal law over international law, the non-justiciability of socio-economic rights and the permissible derogation of fundamental rights in the Nigerian Constitution, will continue to inhibit sustainable protection of women's right to dignity and fundamental rights generally, unless the Nigerian Courts effectively apply the lessons of judicial creativity and activism proposed in this thesis.

⁹⁴ (2000) 6 NWLR 228

⁹⁵ *Ibid* at 258.

(b) Legislative Docility and Non-Pro-active Legislature: The insensitivity and alleged corruption and profligacy of the Nigerian National Assembly is a capable of hindering sustainability in the protection of women's right to dignity, other fundamental rights, and over-all national development.⁹⁶ Unnecessary partisan bickering and unlawful financial inducements, among others, may hinder honest law-making and budgeting functions necessary for making law and policy for sustainable protection of women's right to dignity. The corruption, docility and insincerity of the National Assembly is manifest in the following report:

The history of the National Assembly is replete with diverse forms of corruption. It is obvious to Nigerians that the level of budgetary indiscipline exhibited by the National Assembly in the past years is alarming. Constituencies have become instruments of official corruption, fraud and lubricant of primitive accumulation for lawmakers, as constituencies across the country have never had the impact of constituency projects fund that had been given to lawmakers yearly. The two chambers are fast transforming into discredited institutions of the Nigerian state where lawmakers desecrate every known elements of civilized democratic principles. The responsibility of law-making is no longer the remit of prudent, intelligent and honourable men, but of those who engage in profligacy and depravity. Members of the National Assembly have created the impression that the country does not have people who have credibility in public offices.⁹⁷

Nigerian socio-religious cultures also approve of wife battery as a proper way to discipline a wife. Unfortunately too, Section 55 (1) (b) of the Nigerian Penal Code⁹⁸ permits wife chastisement as long as it does not cause grievous bodily harm.⁹⁹

In the case of *Akinbuwa v. Akinbuwa*,¹⁰⁰ a Nigerian Court of Appeal equally endorsed wife chastisement by affirming the provisions of 55 of the Penal Code.

⁹⁶ Akindle, S. T., Adeyemi, O. O., & Aluko, O. A. (2012). Democracy, Governance, Legislative Challenges and Impediments in Nigeria, 1999-2011. *J. Pol. & L.*, 5, 175.

⁹⁷ Ezea, S. (2011). "How the National Assembly Members Squander Nigerian Resources", *Guardian*, Saturday May 21, P54.

⁹⁸ Nigeria Penal Code CapC3 Laws of the Federation 2004.

⁹⁹ The Penal Code however, does not set any limit or scope for the 'grievous bodily harm.'

Consequently, domestic violence will, regrettably, persist unabated and underreported by women, especially for fear of shame, ejection from the home or other repercussion,¹⁰¹ until there is a change in the legislative indifference to certain constitutional and legislative provisions,¹⁰² and until Nigerian Courts adopt activist approaches to judicialization and adjudication, for instance, by insisting that certain customs are repugnant to natural justice, equity and good conscience,¹⁰³ and therefore, grossly unacceptable in a globalized democratic society.

(c) Judicial Attitude to Legal Pluralism: The conflicts of gender and cultural rights induced by the practice of customary law and adherence to socio-cultural and religious mythologies *vis-à-vis* the regular civil law, affect family-law reform. Women may, therefore, continue to suffer varying degrees of harm and abuse because entrenched socio-cultural norms may make it difficult to oust legal pluralism, which recognizes multiple family law codes.¹⁰⁴

Nigerian Courts can, however, resolve this conflict by ensuring that all customs and traditions, including Islamic law,¹⁰⁵ which are contested as obnoxious or inhuman and degrading to the dignity rights of women, are put to the strict tests of the *Repugnancy Doctrine* which requires that for customs to be recognized as law, they must not be repugnant to “natural justice, equity and good conscience.”¹⁰⁶

¹⁰⁰ (1998) 9 NWLR (Pt 564)100.

¹⁰¹ Egbue, *op. cit.* at 215.

¹⁰² Akindle, S. T., Adeyemi, O. O., & Aluko, O. A. (2012). Democracy, Governance, Legislative Challenges and Impediments in Nigeria, 1999-2011. *J. Pol. & L.*, 5, 175.

¹⁰³ Asiedu-Akrofi, D. (1989). Judicial recognition and adoption of customary law in Nigeria. *The American Journal of Comparative Law*, 571-593.

¹⁰⁴ Vickers, J. (2013). Territorial Pluralism and Family-Law Reform: Conflicts between Gender and Culture Rights in Federations, North and South. *Politikon*, 40(1), 57-82.

¹⁰⁵ Ogwurike, C. (1966). Source and Authority of African Customary Law, *The. U. Ghana LJ*, 3, 11.; Asiedu-Akrofi, D. (1989). Judicial recognition and adoption of customary law in Nigeria. *The American Journal of Comparative Law*, 571-593.

¹⁰⁶ The history of the repugnancy test in Nigeria has been traced to Section 19 of the Supreme Court Ordinance No. 4 of 1876 which stated that: “Nothing in this ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the said colony and territories subject to its jurisdiction, such Law or Custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature.”

In the old Nigerian, Privy Council case of *Eshugbayi Eleko v. Officer Administering Government of Southern Nigeria*,¹⁰⁷ Lord Atkin emphasised that a “barbarous custom” must be rejected on the grounds of repugnancy to “natural justice equity and good conscience.”¹⁰⁸

Hon. Justice Modibo Ocran of the Supreme Court of Ghana,¹⁰⁹ even highlighted synonymous connotations of the repugnancy doctrine. According to him:

The repugnancy clauses were meant to rule out laws and customs perceived to be against Christian values and morality or cruel and unusual... There were various formulations of these clauses. Some stated that the rules should not be “repugnant to natural justice, equity and good conscience.” Others read: “Not contrary to [religious] justice, morality or order.” Still others read: “Not repugnant to morality, humanity or natural justice or injurious to the welfare of the natives.”¹¹⁰

Justice Akinola Aguda seemingly summed it up in the Botswanan case of *Unity Dow v. Attorney-General of Botswana*,¹¹¹ when he observed that:

Customs and traditions have never been static; they have always yielded to express legislation.... A constitutionally guaranteed right cannot be overridden by customs... The customs will be read so as to conform to the Constitution. But, where it is impossible, it is the custom, not the Constitution which must go.

This provision “marked the beginning of subjection of customary Law to the Repugnancy Test,” and it was replicated in other statutes particularly, the Supreme Court Proclamation No. 6 of 1900; Section 13 of the Supreme Court Ordinance No. 6 of 1914; Section 20 of the Supreme Court Ordinance No. 23 of 1943 (cap 211) Laws of Nigeria 1948; Section 17 of the Native Courts Proclamation No. 9 of 1900 and Section 16 of the Native Courts Ordinance (cap 142) Laws of Nigeria: (See, Igwe, O. (2014). Repugnancy Test and Customary Criminal Law in Nigeria: A Time for Re-Assessing Content and Relevance. Available at SSRN 2528497, pp.4-5.

¹⁰⁷ Appeal No. 42 of 1930, judgment delivered on Tuesday, 24 March, 1931.

¹⁰⁸ In *Edet v. Essien* (1932) 11 NLR 47, the old pre-independence Nigerian Supreme Court applied this doctrine to reject the custom which allowed a husband to take paternity of the children which his wife had for another man, because that neither paid dowry for his wife nor did he refund him the dowry/bride price which he paid.

¹⁰⁹ Quoting from sources cited in ANTONY ALLOTT, NEW ESSAYS IN AFRICAN LAW (Allott ed., Butterworth & Co. Ltd. 1970, at p. 158), referring to adoption of some customary laws while implementing statutory regulation.

¹¹⁰ Ocran, M. (2015). The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa. *Akron Law Review*, 39(2), 4, p. 11.

¹¹¹ 1982 LRC (const) 623.

It is thus obvious, and the thesis makes bold to strongly re-emphasise, that aside resolving the threat of the legal pluralism conflict in the Nigerian jurisprudence, judicial attitude can generally, make or mar the quest for a sustainable legal framework for the protection of women's right to dignity in Nigeria, and elsewhere.

(d) Judicial Corruption and Judicial Mind-set in Constitutional Interpretations:

Although Judicial corruption appears to be a negative world phenomenon,¹¹² the point has, however, been stressed that “within the Nigerian judicial system, there are perceptions that some are more corrupt than others.”¹¹³ Consequently, judicial corruption may severely obstruct the quest for sustainable protection of women's right to dignity and fundamental rights generally.

Undoubtedly, the Nigerian Constitution is replete with provisions which are interpreted to either deny the realities of women or out rightly discriminate against them,¹¹⁴ yet, most unfortunately, Nigerian judges seem indifferent. This thesis, therefore, shares the contention of Andrew Iwobi, that “patriarchy has been assimilated into the machinery of state law through the judicial process.”¹¹⁵ The patriarchal mind-set of some Nigerian judges, especially on equality and dignity of women and men will, continually plague the quest for sustainable protection of women's right to dignity in Nigeria.¹¹⁶

¹¹² Ayodeji, G. I., & Odukoya, S. I. (2014). Perception of Judicial Corruption: Assessing its implications for Democratic Consolidation and Sustainable Development in Nigeria. *Journal of Sustainable Development in Africa*, 16(2), 67-80.

¹¹³ Kelly, R. M. (2014). *Corruption in Africa: cultural, economic and political factors which impact corruption and potential solutions* (Doctoral dissertation, Rutgers, The State University of New Jersey).

¹¹⁴ Ogunniran, I. (2015). Gender issues and the Nigerian constitution: a ray of light, or twilight on the horizon? *Gender Questions*, 3(1), 114-132.

¹¹⁵ Iwobi, A. U. (2008). No cause for merriment: the position of widows under Nigerian law. *Canadian Journal of Women and the Law*, 20(1), 37-86.

¹¹⁶ Interestingly, some Nigerian judges have applied adopted the activist approach to demonstrate the resolve of the judiciary for zero tolerance for discrimination against women, especially in relation to property rights. (See, Chinwuba, N. N. (2015). Ending Inequality in Nigeria: A Refreshing Approach from the Nation's Judiciary. *International Journal of Law, Policy and the Family*, 29(3), 341-350.

Ordinarily, the consensus in modern democracies is that constitutions should be based on inclusivity. According to Justice Akinola Aguda,

I conceive it the primary duty of the Judges to make the Constitution grow and develop in order to offset the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.¹¹⁷

6.5 Conclusion

Having explored the legal framework for the protection of the right to dignity of women in Nigeria, India and South Africa as well as in regional and international law, it can be safely concluded that while the South African framework is strongest in constitutional guarantees, the Indian framework is strongest in judicial activism and innovation which, practically speaking, even places it at par with the South African constitutional advances with reference to the judicial enforcement of socio-economic rights and fundamental rights generally.

India's judicial activism also equates right to human dignity to right to life in Article 21, thus affirming the inviolability of human dignity. To the contrary, the Nigerian framework is weak and deficient in constitutional guarantees, enforcement procedure, right of access and judicial activism.

Judicial activism and modern constitutionalism are ideal prerequisites for addressing key socio-political issues and defining the course of the ship of state,¹¹⁸ for social transformation, sustainability and globalization of the legal framework for the protection of the right to dignity of women, as well as the attainment of Millennium

¹¹⁷ *Unity Dow v. Attorney-General of Botswana*, *Supra*.

¹¹⁸ Maldonado, D. B. (2013). *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*: Cambridge University Press, p. 4.

Development Goal No. 3: gender equality and empowerment of women, in Nigeria and other developing countries.

Of course, growing international dialogue on this subject create room for the progressive elimination of every threat to the dignity and equality of women. However, individual state governments need to emphasise on prevention and victim support by addressing and redressing the many socio-cultural, political and economic structures which subordinate women and threaten their right to dignity, and by making decisive budget commitments as well as the implementation of existing national programmes and policies in addition to judicial and legislative advances. There is also need for joint individual, community and group interventions involving both the public and private sector in order to alter discriminatory social and patriarchal mind-sets and norms which ordinarily promote violence against women by encouraging male domination and women subordination.¹¹⁹ Accordingly, the need for elaborate national policies and programmes for the education, health and empowerment of women in Nigeria and beyond cannot be overstretched. This will include adequate training for health workers and security personnel on standard strategies for victim assessment, assistance and support, among others.

This calls for serious rethink, especially by the Government, the National Assembly and the Supreme Court of Nigeria, because the condition of women in a society is an index of that society's place in civilization,¹²⁰ hence the recommendation for Nigeria to make a "constitutional borrowing"¹²¹ from South Africa and "judicial borrowing" from India to bridge the gaps in its existing legal framework for the protection of the right to dignity of women. The combination of constitutional and judicial borrowings will

¹¹⁹ Ojilere, A., & Gan, C. C. (2015). Learning from the Indian Judiciary: New Directions for Securing Nigerian Women's Right to Dignity. *Asian Women*, 31(1), 81-106.

¹²⁰ Bhat, Z. A. (2014). Gender Bias and Socio-Economic Problems of Women in India. *Abhinav-National Monthly Refereed Journal of Research in Arts & Education* (Online ISSN 2277-1182), 3(4), 8-13, at 8.

¹²¹ D.M. Davis, "Constitutional Borrowing: The Influence of Legal Culture and Local History in The Reconstitution of Comparative Influence: The South African Experience," (2003) 1 *Int'l J. Const. L* 181-195.

distinguish and globalize the Nigerian legal framework. This is certainly achievable in the long run. The immediate sustainable alternative will be to apply the constitutional borrowings since this thesis has shown that the creativity and activism of the Indian Supreme Court have bridged gaps in the Constitution, legislation, as well as law and policy including the formulation of legisprudential guidelines which applied in the absence of law.

This research therefore concludes that if reasonably implemented, the recommendations based on various lessons from other jurisdictions, especially India and South Africa, on constitutionalism, responsive legislature, law and policy, and particularly, judicial creativity and activism in the just, fair and reasonable interpretation of fundamental rights as well as in the justiciability or judicialization of socio-economic rights can advance the quest for a sustainable or globalized legal framework for the protection of women's right to dignity in Nigeria as well as other developing countries and set them on the path of meeting the UN Millennium Development Goal No.3, that is, gender equality and women empowerment,¹²² the actualization of which, according to Kunle Sehinde¹²³ is "the one needed to achieve all other MDGs."

¹²² Claudia García-Moreno, Cathy Zimmerman, Alison Morris-Gehring, Lori Heise, Avni Amin, Naemah Abrahams, Oswaldo Montoya, Padma Bhate-Deosthali, Nduku Kilonzo, Charlotte Watt, "Addressing violence against women: a call to action" *The Lancet*, Series 5 [www.thelancet.com](http://dx.doi.org/10.1016/S0140-6736(14)61830-4) Published online November 21, 2014 [http://dx.doi.org/10.1016/S0140-6736\(14\)61830-4](http://dx.doi.org/10.1016/S0140-6736(14)61830-4) (accessed 9/12/2014).

¹²³ Sehinde, B. K. (2013). An Overview of Legal and Implementation Framework of Nigeria's National Gender Policy. In R. I. Ako-Nai (Ed.), *Gender and Power Relations in Nigeria* (pp. 87-100). Plymouth, UK: Lexington Books, at 89.

REFERENCES

Books

- Agbasiere, J. T. (2000). *Women in Igbo Life and Thought*. London: NY: Routeledge.
- Aguda, A. A. (2002). *New Perspective in Law and Justice in Nigeria*, (National Institute of Policy and Strategic Studies, Kuru), 2002.
- Akinboye, S. O. (ed.) (2004). *Paradox of Gender Equality in Nigerian Politics: Essays in Honour of Dr. (Mrs.) Veronica Adeleke*. Concept Publications Ltd, Lagos.
- Ako-Nai, R. I. (ed.), (2013). *Gender and Power Relations in Nigeria*. Plymouth, UK: Lexington Books.
- Allott, A. (1970). *New Essays in African Law* (Allott, A. (ed.), Butterworth & Co. Ltd. 1970.
- Anyogu, F. (2009). *Access to Justice in Nigeria: A gender Perspective*. Enugu, Ebenezer Productions Nigeria Ltd.
- Basu, D. D. (2008). *Commentary on the Constitution of India*. 8th Edition, Vol. 3, LexisNexis Butterworths, Nagpur.
- Basu, J. P. (2002). *Law Relating to Protection of Human Rights under the Indian Constitution and Allied Laws*. Modern Laws Publications, Allahabad, India.
- Buss, T. F., & Ahmed, U. (2015). Social Equity and Development. In N. J. Johnson & J. H. Svara (Eds.), *Justice for All: Promoting Social Equity in Public Administration* (pp. 56-75). New York, USA: Routledge.
- City, S. (1999). Violence against women in South Africa: A resource for journalists. *Johannesburg: Soul City Institute for Health and Development Communication*.

- De Schutter, O. (2010). *International human rights law: cases, materials, commentary*: Cambridge University Press.
- De Zayas, A., Alfredsson, G., Grimheden, J., & Ramcharan, B. G. International Human Rights Monitoring Mechanisms. *Essays in Honour of Jakob Th. Möller (Den Haag 2001)*, 123-128.
- Donnelly, J. (1989). *Universal Human Rights in Theory and in Practice*. Ithaca and London; Cornell University Press.
- Ezeilo, J. N. & Alumanah, J. N. E. (Ed.) (2008). *Bride Price and the Implications for Women's Rights in Nigeria*, Joint Publication of WomenAid Collective (WACOL) in Partnership with the Faculty of Law, University of Nigeria, Enugu Campus and the Faculty of Social Sciences, University of Nigeria, Nsukka.
- Gasioukwu, M. O. U (2003) *Human rights: History, Ideology and Law*. Jos, Nigeria: Fab educational Books.
- Hale, S. M. *History of the Pleas of the Crown*. Vol. 1.
- Hammudah, A. A. A. (1977). *The Family Structure in Islam*, Saudi Arabia: International Islamic Publishing House.
- Harris, S. P. F. (1919). *Principles of the Criminal Law*. 13th Ed. Sweet & Maxwell, London.
- Horowitz, D. L. (2013). *Constitutional change and democracy in Indonesia*: Cambridge University Press.
- India, Ranchhoddas, R., Thakore, D. K., Chandrachud, Y. V., Manohar, V. R., & Singh, A. (2007). *Ratanlal & Dhirajlal's the Indian Penal Code (Act XLV of 1860): With Exhaustive Notes, Comments, Case-law References and State Amendments, Etc*. Wadhwa & Company.

- Jain, M. P. (2003). *Indian Constitutional Law (With Constitutional Documents)*. New Delhi, India, Wadhwa & Company Nagpur.
- Jemibewon, D. M. (1998). *The Military, Law and Society: Reflections of a General*. Ibadan: Spectrum Books Ltd.
- Johnson, N. J. & Svava, J. H. (Eds.) (2015). *Justice for All: Promoting Social Equity in Public Administration*. New York, USA: Routledge.
- Kapiszewski, D. Silverstein, G., & Kagan, R. A. (Eds.) (2013). *Consequential Courts- Judicial Roles in Global Perspective*. New York, USA: Cambridge University Press.
- Khan, M. W. (2000). *Woman in Islamic Shari'ah*. The Islamic Centre, New Delhi.
- Khan, S. L. A. (2001). *Justice Bhagwati on Fundamental Rights and Directive Principle*. Deep & Deep Publications Pvt. Ltd. New Delhi, India.
- Khushalani, Y. (1982). *The Dignity and Honour of Women as Basic and Fundamental Human Rights*: Martinus Nijhoff Publishers.
- Kumar, R. (1995). *From Chipko to Sati: The Contemporary Indian Women's Movement*. Westview Press.
- Larsson, T. (2001). *The Race to the Top: The Real Story of Globalization*. U.S.: Cato Institute.
- Louw, L. (2005). *An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights*. Unpublished LLD thesis, University of Pretoria, 61.
- Maldonado, D. B. (ed), (2013). *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*. Cambridge University Press, New York, USA.

- Malemi, E. (2012). *The Nigerian Constitutional Law (With Fundamental Rights Enforcement Procedure Rules, 2009)*. Lagos: Princeton Publishing Company.
- Maluleke, M. J., & Madonsela, T. (2004). *Women and the Law in South Africa: Gender equality Jurisprudence in Landmark Court Decisions*. Department of Justice and Constitutional Development, Republic of South Africa.
- Meron, T. (ed.) (1984) *Human Rights in International Law: Legal and Policy Issues* 5.
- Muntaqim, K. A. (2004). *Protection of Human Rights (National and International Perspectives)*. Law Publishers (India) Pvt. Ltd.
- Murray, R., & Long, D. (2015). *The Implementation of the Findings of the African Commission on Human and Peoples' Rights*: Cambridge University Press.
- Ndubuisi, F. N., & Nathaniel, O. C. (2002). *Issues in Jurisprudence and Principles of Human Rights*. Lagos, Nigeria: Dmodus Publishers.
- Obiora, C. O. (2007). *The African Human Rights System- Activist Forces and International Institutions*. Cambridge: Cambridge University Press.
- Oluwasina, A. V. (2011). *Domestic Impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa: A Case Study of Nigeria*. University of Pretoria.
- Omonubi-McDonnell, M. (2003). *Gender Inequality in Nigeria*. Spectrum Books Ltd.
- Omotola, J. A. (ed.) (1981). *Essays in Honour of Justice T.O. Elias*. Lagos; University of Lagos Press.
- Oputa, C. A. (1989). *Human Rights in the Political and Legal Culture of Nigeria*. Lagos Nigerian Law publications.

- Pieterse, M. (2014). *Can Rights Cure? The impact of human rights litigation on South Africa's health system*. Faculty of Law, University of Pretoria, South Africa: Pretoria University Law Press (PULP).
- Propper, A. M. (1981). *Prison Homosexuality: Myth and Reality*. Lexington, MA: D C Heath.
- Sachs, J. D. (2015). *The Age of Sustainable Development*: Columbia University Press.
- Scacco, A. M. (ed.) (1982). *Male Rape: A Case Book of Sexual Aggressions*. New York: AMS Press.
- Steinerte, E. & Wallace, R.M.M. (2009) *United Nations Protection of Human Rights*. The University of London Press.
- The Holy Quran and the *Hadith* of the Prophets.
- The New Shorter Oxford English Dictionary- The New Authority on the English Language (Edited by Lesley Brown) vol. 2 (N-Z), (1993) Clarendon Press, Oxford.
- Udombana N. J. (2003). *Human Rights and Contemporary issues in Africa*. Lagos: Malthouse Press Ltd.
- Verma, S. K. & Kusum (eds.) (2000). *Fifty Years of the Supreme Court of India: Its Grasp and Reach*. Oxford University Press, Delhi.
- Williams, G. L. (1995). *Proof of Guilt*. The Hamlyn Trust Lectures, Stevens & Sons Ltd, London.
- Wooden, W.S., & Parker, (1982). *Men Behind Bars: Sexual Exploitation in Prison*. New York: Plenum Press.

Articles

- Abeyratne, R. (2014). Socioeconomic Rights in the Indian Constitution: Toward A Broader Conception of Legitimacy. *Brooklyn J. Int'l L.*, 39, 1-521.
- Achenyo, A.L. (2009). Harmonizing the Status of women and Human Rights. *Journal of Contemporary Legal Issues*, 1(1), 189-201.
- Ackermann, L.W.H (2006). Equality and Non-Discrimination: some Analytical Thoughts. 22 *SAJHR* 597-612.
- Ackermann, L.W.H. (2000). Equality and the South African Constitution: The Role of Dignity. *Bram Fischer Lecture* delivered at Rhodes House, Oxford on 26 May 2000.
- Aduba, J. N. (1999). "The Protection of Human Rights in Nigeria" in Obilade, A. O., Nwankwo, C. O. & Tunde – Olowu, A. (eds) Text for Human Rights Teaching in Schools. *Constitutional Rights Project*, Lagos, 1999, p.109 at 137.
- Aduba, J.N. et al, (1994). The Dynamics of Social and economic Rights. Proceedings of the 32nd Annual Conference of the *Nigerian Association of Law Teachers (NALT)*, May 10-13, University of Lagos, Akoka, Lagos, Nigeria.
- Agbakoba, O. "The Creation of the African Court of Justice and Human Rights", available online at www.nbaprogrammes.org. (14/4/2015).
- Agbakwa, S. C. (2014). Reclaiming humanity: economic, social, and cultural rights as the cornerstone of African human rights. *Yale Human Rights and Development Journal*, 5(1), 5.
- Agomo, C. K. (2004). The Legal Framework for Gender Equality in Nigeria. In *Paradox of Gender Equality in Nigerian Politics: Essays in Honour of Dr.(Mrs.) Veronica Adeleke*, Solomon O. Akinboye (ed). Concept Publications Ltd, Lagos, 91-100.

- Akindle, S. T., Adeyemi, O. O., & Aluko, O. A. (2012). Democracy, Governance, Legislative Challenges and Impediments in Nigeria, 1999-2011. *J. Pol. & L.*, 5, 175.
- Akintayo, A. E. (2014). A Good Thing from Nazareth? Stemming the tide of neo-liberalism against socio-economic rights: Lessons from the Nigerian case of *Bamidele Aturu v Minister of Petroleum Resources and Others*, *ESR Review: Economic and Social Rights in South Africa*, 15(2), 5-9.
- Akinwumi, O. S. (2010). Legal impediments on the practical implementation of the Child Right Act 2003. *International Journal of Legal Information*, 37(3), 10.
- Aligba, A. (2011). Fundamental Rights (Enforcement Procedure) Rules 2009: An Appraisal. *Benue State University Journal of Private and Public Law*, *BSUJPPL*, 1(1), 61-70.
- Al-Rodhan, N. R., & Stoudmann, G. (2006). Definitions of globalization: A comprehensive overview and a proposed definition. Available at http://www.wh.agh.edu.pl/other/materialy/678_2015_04_21_22_04_13_Definitions%20of%20Globalization_A%20Comprehensive%20Overview%20and%20a%20Proposed%20Definition.pdf. (17/6/2015).
- Alter, K. J., Helfer, L. R., & McAllister, J. R. (2013). A new international human rights court for West Africa: the ECOWAS community court of justice. *American Journal of International Law*, 107(4), 737-779.
- Ambily, P. (2014). Evaluating the Criminal Justice Interventions for 'Intimate Partner Violence' in India: The Need for a Paradigm Shift. *SPCERA International Journal of Law and Governance*, (SPCERA IJLG), 3(6), 32-42.
- Ambos, K. (2012). Sexual Offences in International Criminal Law, with a Special Focus on the Rome Statute of the International Criminal Court. *Understanding and Proving International Sex Crimes*, Beijing, 143-173.

- Amoah, P. (1992). African Charter on Human and Peoples' Rights-An Effective Weapon for Human Rights, *The. Afr. J. Int'l & Comp. L.*, 4, 226.
- Anderson, K. (2008). Violence against Women: State Responsibilities in International Human Rights Law to Address Harmful Masculinities. *Neth. Q. Hum. Rts.*, 26, 173.
- Aniekwu, N. I. (2006). Legalising Cairo: Prospects and Opportunities for Reproductive Rights in Nigeria. *1 & 2 CODESRIA Bulletin* 49.
- Annan, K. A. (2008). Establishing a Culture of Prevention. *The Anna Lindh Lecture, Raoul Wallenberg Institute, University of Lund, Sweden*. 2 October 2008. <http://rwi.lu.se/old/publicseminars/annalindh/lecture08.pdf>.
- Anyogu, F., & Arinze-Umobi, C. (2011). The Globalized World and Gender Rights in Nigeria: The Gains, the Losses. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 2, 152.
- Arinze-Umobi, C., & Iguh, A. (2011). Child's Sexual abuse: The Role of International Instrument in Nigeria. *Benue State University Journal of Private and Public Law, BSUJPPL*, 1(1), 71-79.
- Asiedu-Akrofi, D. (1989). Judicial recognition and adoption of customary law in Nigeria. *The American Journal of Comparative Law*, 571-593.)
- Ayodeji, G. I., & Odukoya, S. I. (2014). Perception of Judicial Corruption: Assessing its implications for Democratic Consolidation and Sustainable Development in Nigeria. *Journal of Sustainable Development in Africa*, 16(2), 67-80.
- Babu, S. R. (2013). Contribution of the Supreme Court to the Growth of Democracy in India. *NUJS Law Review, NUJS L. Rev*, 6.
- Badami, N., & Chandu, M. (2014). Access to Justice in India. In *Institutional Competition between Common Law and Civil Law*, Chapter 7(pp. 211-235). Springer Berlin Heidelberg.

- Badjena, S. S. (2014). Sexual Violence against Women with Disabilities and the Legislative Measures in India. *Odisha Review* (April-May 2014): 46-57.
- Bag, K. K., & Roy, P. B. (2012). Changing Face of women Exploitation in India. *International Journal of Social Science Tomorrow*. 1(1), 1-6.
- Barth, J., Bermetz, L., Heim, E., Trelle, S., & Tonia, T. (2013). The current prevalence of child sexual abuse worldwide: A systematic review and meta-analysis. *International journal of public health*, 58(3), 469-483.
- Bassey, A. O. (1995). Religion, Culture and tradition in Cross River State. In Discrimination, Religion and Culture: A Theoretical Approach- Eliminating Discrimination against Women- *Constitutional Rights Project*, 24-25.
- Bastos, A., Casaca, S. F., Nunes, F., & Pereirinha, J. (2009). Women and poverty: A gender-sensitive approach. *The Journal of Socio-Economics*, 38(5), 764-778.
- Baxi, U. (2000). The avatars of Indian judicial activism: Explorations in the geographies of [In] Justice. *S. Verma and Kusum (eds) The Indian Supreme Court: Fifty Years Later*, 156-209.
- Bertrand, J. (2015). A Review of "Constitutional Change and Democracy in Indonesia" Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia*. Cambridge: Cambridge University Press, 2013. Pp. 326. ISBNs 1107641152 and 978-1107641150. *Nationalism and Ethnic Politics*, 21(4), 493-495.
- Bhadange, C. P. (2014). *Socio-Legal Issues of Differently Abled Persons of India*. Paper presented at the UGC Sponsored National Seminar On 'Equitable Society with Equal Opportunities'
- Bhagwati, P. (1992). The role of the judiciary in the democratic process: Balancing activism and judicial restraint. *Commonwealth Law Bulletin*, 18(4), 1262-1267.
- Bhagwati, P. N. (1987). Social Action Litigation: The Indian Experience. In Trivetelram and Coomaraswamy (eds.), *The Judiciary in Plural Societies*, p.20.

- Bhagwati, P. N. (1988). The Domestic Application of International Human Rights Norms. In *Developing Human Rights Jurisprudence*, Inaugural address at the Judicial Colloquium in Bangalore, held February 24-26, 1988.
- Bhan, G. (2014). Moving forward, perhaps: The 2013 India Supreme Court Decision on Section 377. In S. Corrêa (Ed.), *Putting the Law in its Place: Analyses of recent developments in law relating to same-sex desire in India and Uganda*, 20-23.
- Bhat, Z. A. (2014). Gender Bias and Socio-Economic Problems of Women in India. *Abhinav-National Monthly Refereed Journal of Research in Arts & Education* (Online ISSN 2277-1182), 3(4), 8-13.
- Bhattacharyya, R. (2013). Criminal Law (Amendment) Act, 2013: Will It Ensure Women's Safety in Public Spaces? *Journal Space and Culture, India*, 1(1), 13-26.
- Binford, W. (2015). The Constitutionalization of Children's Rights in South Africa: 1994-2014. *New York Law School Law Review*, 59(2).
- Bogale, B. (2014). Regional human rights institutions: a comparison of the European and the African human rights systems. *East African Journal of Peace and Human Rights*, 20(1), 44-67.
- Boukongou, J. D. (2006). The appeal of the African system for protecting human rights. *African Human Rights Law Journal* 6, 271.
- Brady, D., & Kall, D. (2008). Nearly universal, but somewhat distinct: The feminization of poverty in affluent Western democracies, 1969–2000. *Social Science Research*, 37(3), 976-1007.
- Breen, D., & Nel, J. A. (2014). South Africa-A home for all: The need for hate crime legislation. *South African Crime Quarterly*, 38, 33-43.

- Brunnstrom, D. (2014). Myanmar still uses rape as weapon of war: women's group. *Reuters, Washington, (Jan, 14, 2014)*.
<http://www.reuters.com/article/2014/01/14/us-myanmar-military-rape-idUSBREA0D0CA20140114>. (2/3/2014).
- Bunch, C. (1990). Women's rights as human rights: Toward a re-vision of human rights. *Hum. Rts. Q.*, 12, 486.
- Buss, D. E. (2009). Rethinking 'rape as a weapon of war'. *Feminist legal studies*, 17(2), 145-163.
- Carmi, G. E., & Shultziner, D. (2013). Dignitizing Constitutions Worldwide: On the Proliferation of Human Dignity in National Constitutions. *The Selected Works of Guy E Carmi* (unpublished). Available at:
http://works.bepress.com/guy_carmi/6 (15/6/2015).
- Casmir, K. A., Ome, E., & Nwankwo, A. (2014). Re-Examination of Igbo Values System, and the Igbo Personality: A Kantian and African Comparative Perspective. *Open Journal of Philosophy*, 4(03), 397.
- Cassels, J. (1989). Judicial Activism and Public Interest Litigation in India: Attempting the Impossible? *The American Journal of Comparative Law*, 495-519.
- Chan, K. L. (2011). Association between childhood sexual abuse and adult sexual victimization in a representative sample in Hong Kong Chinese. *Child abuse & neglect*, 35(3), 220-229.
- Chaskalson, P (2000). 'Dignity as a Foundational Value in the South African Constitution'. *Third Brain Fischer Lecture* delivered on 18 May 2000 at the Civic Centre, Johannesburg. Also published in (2000) **16 SAJHR** 193).
- Chegwe, E. N. (2009). Legalism and the Realization of the Right to Life. *Nigerian Journal of Public Law (NJPL)*, 2(1), 226-243.

- Chika, I. S. (2011). Legalization of marital rape in Nigeria: a gross violation of women's health and reproductive rights. *Journal of Social Welfare & Family Law*, 33(01), 39-46.
- Chika, I. S., & Nneka, U. (2014). Discriminatory Cultural Practices and Women's Rights among the Igbos of South-East Nigeria: A Critique. *Journal of Law, Policy and Globalization*, 25, 18-27.
- Chinwuba, N. N. (2015). Ending Inequality in Nigeria: A Refreshing Approach from the Nation's Judiciary. *International Journal of Law, Policy and the Family*, 29(3), 341-350.
- Chirwa, D. M. (2006) "Reclaiming wo(manity): The merits and demerits of the African Protocol on Women's Rights" 56 *Netherlands international Law Review* 63-96.
- Choudhury, A. D. (2012). *Review Jurisdiction of Supreme Court of India: Article 137*. Retrieved 29/8/2014, from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169967.
- Chukwudum. S. O. (2001) Gender relations: An Igbo cultural perspective. *WOREC Journal of Gender studies*, Maiden Edition. Vol. 1 No. 1, Imo State University, Owerri.
- Coker, A. (2013). Critical Appraisal of Domestic Violence in Nigeria. In Chapter 6 of *Gender and Power Relations in Nigeria*, Ronke Iyabowale Ako-Nai (ed). Lexington Books, Plymouth, UK, 77-86.
- Cooper, D., Morroni, C., Orner, P., Moodley, J., Harries J., & Cullingworth, L., et al. (2004). Ten years of democracy in South Africa: Documenting transformation in reproductive health policy and status. *Reproductive Health Matters*, 12(24), 70-85.
- Dada, J. A. (2013). Human Rights Protection in Nigeria: the Past, the Present and Goals for Role Actors for the Future. *Journal of Law, Policy and Globalization*, 14, 1-13.

- Dada, J. A. (2012). Impediments to Human Rights Protection in Nigeria. *Ann. Surv. Int'l & Comp. L.*, 18, 67-92.
- Dada, J. A. (2013). Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal. *Journal of Law, Policy and Globalization* 10, 1-18.
- Dankadai, L. B. (2015). An Appraisal of Children's Right and Child Domestic Servants under Child Rights Act 2003. *Advances in Social Sciences Research Journal*, 2(3), 261-270.
- D'Avella, J. H. (2006). Death Row for Child Rape-Cruel and Unusual Punishment under the Roper-Atkins Evolving Standards of Decency Framework. *Cornell L. Rev.* 92, 129.
- Davis, D.M. (2003). Constitutional Borrowing: The Influence of Legal Culture and Local History in The Reconstitution of Comparative Influence: The South African Experience, 1 Int'l J. Const. L 181-195.
- Diken, B., & Laustsen, C. B. (2005). Becoming abject: Rape as a weapon of war. *Body & Society*, 11(1), 111-128.
- Donnelly, J. (1989). *Universal Human Rights in Theory and in Practice*. Ithaca and London; Cornell University Press.
- Dugard, J. (1997). International Law and the South African Constitution. *Eur. J. Int'l L.*, 8, 77-92.
- Dugard, J. (2015). Closing the doors of justice: an examination of the Constitutional Court's approach to direct access, 1995-2013: political rights since 1994 focus. *South African Journal on Human Rights*, 31(1), 112-135. *Open Democracy/Open Global Rights* (25 May, 2015). Available at: <https://www.opendemocracy.net/openglobalrights/jackie-dugard/closing-doors-of-justice-south-african-constitutional-court%E2%80%99s-approac> (31/5/2015).

- Durojaye, E. (2013). Woman, but not human: Widowhood practices and Human Rights Violations in Nigeria. *International Journal of Law, Policy and the Family*, 27(2), 176-196.
- Durojaye, E., Okeke, B., & Adebajo, A. (2014). "Harmful cultural practices and gender equality in Nigeria." *Gender and Behaviour*, 12(1), 6169-6181.
- Egbue, N. G. (2005). Culture Issues in Women's Human Rights among the Igbos of Southern Nigeria: An Appraisal of their Implications to Women Development in Nigeria, *International Journal of Forum for African Women Educationalists in Nigeria*, 1(3) 214.
- Erasmus, G. (1989-1990). The Namibian Constitution and the Application of International Law, 15 S. AR. Y.B. *Int'l l.* 81, 93.
- Erhum, M. O. (2013). An Appraisal of the Protection of Women's Rights under Nigerian Laws. In Ronke Iyabowale Ako-Nai (ed.) *Gender and Power Relations in Nigeria*, Lexington Books, Plymouth, U.K., 61-76.
- Eriksson, M. (2010). Defining Rape: Emerging Obligations for States under International Law? *Örebro Studies in Law* 2.
- Ezebuilo, U. (2008). Bride Price: Another Source of Violence against Women. In Chapter 9, *Bride Price and the Implications for women's Rights in Nigeria*, Joy Ngozi Ezeilo and Josephine Edna Alumanah (ed). Joint Publication of WomenAid Collective (WACOL) in Partnership with the Faculty of Law, University of Nigeria, Enugu Campus and the Faculty of Social Sciences, University of Nigeria, Nsukka, 115-124.
- Fagan, A. (2006). Human Rights. *Internet encyclopaedia of philosophy*, <http://www.iep.utm.edu/hum-rts/> (19/8/2014).
- Fapohunda, T. M. (2012). Women and the Informal Sector in Nigeria: Implications for Development. *British Journal of Arts and Social Sciences*, 4(1), 35-45.

- Farwell, N. (2004). "War rape: New conceptualizations and responses." *Affilia* 19, no. 4, 389-403.
- Force, A. R. T., & Women's Aid Organisation, W. A. O. (2003). *Memorandum on Laws Related to Rape in Malaysia (Proposals and Amendments)*; Submitted by the Anti-Rape Task Force, Prepared by All Women's Action Society (AWAM); Women's Centre for Change, Penang (WCC); Sisters in Islam (SIS); Women's Aid Organization (WAO); Protect and Save the Children (P.S. the Children) *September 2003*.
- French, D., & Samuel, K. (2015). Transitional Justice in Times of "Exponential Change": Constructing Normative Frameworks Fit for Purpose—The Importance of General International Law *Current Issues in Transitional Justice* (pp. 185-208): Springer.
- Fulu, E., Kerr-Wilson, A., & Lang, J. (2014). What Works to Prevent Violence against Women and Girls. *Evidence Review of interventions to prevent violence against women and girls Pretoria: Medical Research Council*.
- García-Moreno, C., Zimmerman, C., Morris-Gehring, A., Heise, L., Amin, A., Abrahams, N., ... & Watts, C. (2015). Addressing violence against women: a call to action. *The Lancet*, 385(9978), 1685-1695. Published online November 21, 2014 [http://dx.doi.org/10.1016/S0140-6736\(14\)61830-4](http://dx.doi.org/10.1016/S0140-6736(14)61830-4) (9/12/2014).
- Ghosh, B. (2013). How does the legal framework protect victims of dowry and domestic violence in India? A critical review. *Aggression and violent behavior*, 18(4), 409-416.
- Ghosh, P. (2013). Judicial Activism and Public Interest Litigation in India. *Available at SSRN 2285517*.
- Glensy, R. D. (2011). Right to Dignity, The. *Colum. Hum. Rts. L. Rev.*, 43, 65.
- Gray, R. F. (1960). Sonjo Bride-Price and the Question of African "Wife Purchases" 1. *American Anthropologist*, 62(1), 34-57.

- Gregg, M. R. (2014). *An incomplete transition? Explaining the ongoing prevalence of violence against women in post-apartheid South Africa*. (Master of Arts), Simon Fraser University, SFU Library, Burnaby, British Columbia, Canada.
- Guruswamy, M., & Aspatwar, B. (2013). Access to Justice in India: The Jurisprudence (and Self-Perception) of the Supreme Court. In D. B. Maldonado (Ed.), *Constitutionalism of the Global South-The Activist Tribunals of India, South Africa, and Colombia* (pp. 329-360): Cambridge University Press.
- Gwangudi, V. M. (2002). Problems Militating against Women's Access to Justice in Nigeria. *University of Maiduguri Law Journal* (5), 13-14.
- Gy, N. (2015). Legal Status of Women in India—Then and Now-A Macro Study. *Journal of Legal Analysis and Research*, 2(1), 90-103.
- Hafner-Burton, E. M. (2014). A social science of human rights. *Journal of Peace Research*, 51(2), 273-286.
- Hamid, R.A. (2014). Islam and Cultural Interferences in the Lives of the Nigerian Women. *Research on Humanities and Social Sciences*, 4(17), 1-7.
- Hartman, J. F. (1983). Unusual punishment: The domestic effects of international norms restricting the application of the death penalty. *U. Cin. L. Rev.*, 52, 655.
- Henkin, L. (1984). International human rights and rights in the United States."In T. Meron (ed) *Human Rights in International Law: Legal and Policy Issues* 5.
- Hillebrecht, C. (2014). The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change. *European Journal of International Relations*, 20(4), 1100-1123.
- Ibe, S. (2014). Expanding the space for economic, social and cultural rights in Nigeria: feature. *ESR Review: Economic and Social Rights in South Africa* 15(2), 3-4.

- Idowu, A.A. (2013). Women's Rights, Violence and Gender Discrimination-The Nigerian Circumstances. In Ronke Iyabowale Ako-Nai (ed.) *Gender and Power Relations in Nigeria*, Lexington Books, Plymouth, U.K., p. 31-45.
- Igwe, O. (2014). Repugnancy Test and Customary Criminal Law in Nigeria: A Time for Re-Assessing Content and Relevance. *Available at SSRN 2528497*
- Ijalaye, D. A. (2004). The Nigerian law of rape in the context of global development, *Ibadan Bar Journal*, Vol. 3 No. 1.
- Iwobi, A. U. (2008). No cause for merriment: the position of widows under Nigerian law. *Canadian Journal of Women and the Law*, 20(1), 37-86.
- Iyassu Menelik, G. Y. (2014). The Issue of Human Rights in Africa. *Africa University (Institute of Peace and Governance), Mutare Zimbabwe.*, 8.
- Jackson, V. C. (2004). Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse. *Mont. L. Rev.*, 65, 15.
- Jain, A., & Gambhir, M. S. (2015). Socio-Economic Women Empowerment: Sharp Focus. *International Journal of Advanced Research in Management (IJARM)*, 6(1), 38-49.
- Jain, N. K. (2006). Article-21 of the Constitution of India. *Human Rights Article-21, Legal Literacy & Awareness*.
- Jayakumar, Y.F. (2014). Liberty and Reproductive Healthcare Justice: Indian Perspective. <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws7/w7-Jayakumar.pdf> (29/8/2014).
- Jeremić, V., & Sachs, J. D. (2014). The United Nations in the age of sustainable development. *The Economic and Social Review*, 45(2), 161-188.

- Jones, S. (1995). Regional Institutions for Protecting Human Rights in Asia. *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 89, Structures of World Order (April 5-8 1995), pp. 475-480. <http://www.jstor.org/stable/25658967> (18/10/2014).
- Joseph, M. G. C., Kirchhoff, G. F., Maden, S. R., & Barkhuizen, J. (2014). Asian passengers' safety study: the problem of sexual molestation of women on trains and buses in Chennai, India. *Acta Criminologica*, 27(1), 57-74.
- Kamminga, M. T. (1999). *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, in THE EU AND HUMAN RIGHTS 553, 554 (Philip Alston ed., 1999).
- Kamminga, M. T. (2014). Challenges in International Human Rights Law. *Challenges in International Human Rights Law*, Ashgate.
- Kanu, I. A. (2014). An Enquiry into the Religio-Cultural Experience of Women in Nigeria: Towards a Philosophy of Reciprocity. *AFRREV LALIGENS: An International Journal of Language, Literature and Gender Studies*, 1(2), 50-60.
- Kapiszewski, D., Silverstein, G., & Kagan, R. A. (2013). *Consequential Courts-Judicial Roles in Global Perspective*. New York, USA: Cambridge University Press, 1-41.
- Karandikar, S., Frost, C., & Gezinski, L. (2014). Patriarchy and Gender-Based Violence: Experiences of Female Sex Workers in India. *International Journal of Social Work*, 1(1), 1-14.
- Kelly, R. M. (2014). *Corruption in Africa: cultural, economic and political factors which impact corruption and potential solutions* (Doctoral dissertation, Rutgers, The State University of New Jersey).

- Kelsall, M. S. (2009). The new ASEAN Intergovernmental Commission on Human Rights: toothless tiger or tentative first step? In L. K. Quintana (Series Ed.), *Analysis from the East-West Center* (pp. 1-8). Honolulu, Hawai'i The Asian Pacific Issues Reports on Topics of Regional Concern.
- Kende, M. S. (2006). President Nelson Mandela's Constitutional Law Legacy. In Human Rights, International Relations and Globalization, published by *Grupo Editorial Ibanez*.
<http://www.law.drake.edu/clinicsCenters/conLaw/docs/recentMaterials-mandelaLegacy.pdf> (24/7/2014).
- Kiran, R. & Krishna, B. (2013). The Practice of International Law in India: An Overview. *International Journal of Legal Studies and Research (IJLSR)*, 2(2).
- Klug, H. (2013). Constitutional Authority and Judicial Pragmatism, Politics and Law in the Evolution of South Africa's Constitutional Court. *Consequential Courts: Judicial Roles in Global Perspective*. New York, USA, Cambridge University Press: 93-113.
- Knowles, G. J. (1999). Male prison rape: A search for causation and prevention. *The Howard Journal of Criminal Justice*, 38(3), 267-282.
- Kohli, A. (2012). Gang Rapes and Molestation Cases in India: Creating Mores for Eve-Teasing *Te Awatea: The Journal of Te Awatea Violence Research Centre*, 10 (1 & 2), 13-17.
- Kura, S. M. & Yero, B. U. (2013). An analysis of Gender inequality and National Gender Policy in Nigeria. *International Journal of Scientific & Engineering Research Volume 4*(1), 8. ISSN 2229-5518 IJSER © 2013 <http://www.ijser.org>. (24/7/2014).
- Lakshmi, L. (2013). The unanswered Social and Legal Issues Relating to Differently abled Persons in India. Retrieved 29/8/2014, from http://www.legalservicesindia.com/article/print.php?art_id=1559.

- Law, D. S. & Versteeg, M. (2012). The Declining Influence of the American Constitution. *New York University Law Review*, 87.
- Leith-Ross, S. (1937). Notes on the Osu system among the Ibo of Owerri Province, Nigeria. *Africa*, 10(02), 206-220. s
- Li Li (2013). Judicial Strategies in Chinese Group Action Cases: A Realistic Reaction to Judicialisation. *Hong Kong Journal of Law, HKJL*, 43(1), 317-348.
- Loewenstein, K. (1937). Militant Democracy and Fundamental Rights, I. *American Political Science Review*, 31(03), 417-432.
- Lu, Y., Nakicenovic, N., Visbeck, M., & Stevance, A. S. (2015). Policy: Five priorities for the UN Sustainable Development Goals-Comment. *Nature*, 520(7548), 432-433.
- Maftean, M. (2015). Dignity, Militant Democracy, and Defending the Democratic Order. In G. Pleyers & I. N. Sava (Eds.), *Social Movements in Central and Eastern Europe: A renewal of Protests and democracy* (pp. 119-138). Bucharest, Romania: Editura Universitatii din Bucuresti.
- Maier, N. B. (2011). The Crime of Rape under the Rome Statute of the ICC (with a special emphasis on the jurisprudence of the Ad Hoc Criminal Tribunals). In *Amsterdam Law Forum* (Vol. 3, No. 2, p. 146).
- Makama, G. A. (2013). Patriarchy and Gender Inequality in Nigeria: The Way Forward. *European Scientific Journal*, 9(17), 115-144.
- Maker, A., Malepe, L., Christofides, N., & Usdin, S. (2000). The value of advocacy in promoting social change: Implementing the new domestic violence act in South Africa. *Reproductive Health Matters*, 8(16), 55-65.
- Maluwa, T. (1998). The Incorporation of International Law and Its Interpretational Role in Municipal Legal Systems in Africa: An Exploratory Survey, 23 *S. Afr. Y.B. Int'l L.* 45.

- Maswikwa, B., Richter, L., Kaufman, J., & Nandi, A. (2015). Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: Evidence from Sub-Saharan Africa. *International perspectives on sexual and reproductive health*, 41(2), 58-68.
- Mate, M. (2013). Public Interest Litigation and the Transformation of the Supreme Court of India In D. Kapiszewski, G. Silverstein & R. A. Kagan (Eds.), *Consequential Courts: Judicial Roles in Global Perspective* (pp. 262-268). New York, USA: Cambridge University Press.
- McQuoid-Mason, D. (2011). Mandatory reporting of sexual abuse under the Sexual Offences Act and the 'best interests of the child'. *South African Journal of Bioethics and Law*, 4(2), 74-78.
- Mehta, S. (2013). Rape law in India: Problems in prosecution due to loopholes in the law. *Available at SSRN 2250448*.
- Merry, S. E. (2003). Constructing a Global Law-Violence against Women and the Human Rights System. *Law & Social Inquiry*, 28(4), 941-977.
- Metcalf, B. D. (2006). Imrana: Rape, Islam, and law in India. *Islamic studies*, 389-412.
- Mogale, R. S., Burns, K. K., & Richter, S. (2012). Violence against Women in South Africa: Policy Position and Recommendations. *Violence against Women*, 18(5), 580-594.
- Monde-Anumihe, C. (2013). *Human Trafficking and Human Rights: The Movement of Women from Nigeria to Europe*. (Bachelor of Arts Syracuse University Honors Program Capstone Projects), Syracuse University, USA. (47).
- Moore, A. J. (2005). Endangered species: Examining South Africa's national rape crisis and its legislative attempt to protect its most vulnerable citizens. *Vanderbilt Journal of Transnational Law*, 38, 1469-1498.

- Moseneke, D. (2012). 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa, *The. Geo. LJ*, 101, 749.
- Mughwai A. (2008). The African Court on Human and Peoples' Rights: Prospects and Challenges. Available online at:
<http://www.cam.es/docs/fiheros/20081003000769pdf->
- Murray, R. (2001). The African charter on human and peoples' rights 1987-2000: An overview of its prospects and problems. *African Human Rights Law Journal* 1(1).
- Murthi, M. (2009). Who is to Blame? Rape of Hindu-Muslim Women in Interethnic Violence in India. *Psychology of Women Quarterly*, 33(4), 453-462.
- Mutua, M. (1999). The African Human Rights Court: A Two-Legged Stool? *Human Rights Quarterly*, 21(2), 342-363.
- Nasir, J. M. (Mrs.) (1999). CEDAW and the Woman under Sharia. *CJLJ* Vol. 5 No. 5.
- Nnadi, I. (2013). Son Preference—A Violation of Women's Human Rights: A Case Study of Igbo Custom in Nigeria. *Journal of Politics and Law*, 6(1), 134-141).
- Nnaemeka-Agu, P. (1991). "Human Rights Proceedings: Domestic Provisions and Experience of Nigeria". *Presented at the Judicial Colloquium on the Democratic Application of International Human Rights Norms*, held in Abuja, Nigeria on 9-13 December.
- Nowak, M. (2009). Eight Reasons Why We Need a World Court of Human Rights. In *International Human Rights Monitoring Mechanisms – Essays in Honour of Jakob Th. Möller* (2nd edn), edited by G. Alfredsson, J. Grimheden, B. G. Ramcharan, and A. de Zayas, 697–706. Leiden; Boston: Martin Nijhoff.

- Nowak, M. (2014). The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights. *Nordic Journal of Human Rights*, 32(1), 3-17.
- Nussbaum, M. C. (2002). Sex, laws, and inequality: what India can teach the United States, *Daedalus*, 95-106.
- Nwafor, A. O. (2009). Enforcing Fundamental Rights in Nigerian Courts – Processes and Challenges. 4 *Afr. J. Leg. Stud.* 1-11.
- Nwankwo, O. (2011). Achieving Thirty-Five Percent Affirmative Action in 2011: The Role of Stakeholders and Implication for National Development. *The Nigerian Electoral Journal*, 4(1), 27-59.
- O'Connell, P. (2011). The Death of Socio-Economic Rights. *The Modern Law Review*, 74(4), 532-554.
- Ocran, M. (2015). The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa. *Akron Law Review*, 39(2), 4, p. 11.
- Oduwole, T. A., & Fadeyi, A. O. (2013). Gender, Economic Activities and Poverty in Nigeria. *Journal of Research in Peace, Gender and Development (JRP GD)*, 2(7), 106-125.
- Ofo, N. (2011). Amending the Constitution of the Federal Republic of Nigeria 1999. *African Journal of Legal Studies*, 4(2), 123-148.
- Ogba, C. O. (2010). Rape Victims: Re-defining the law governing rape in Nigeria. *University of Ado-Ekiti Law Journal*, Vol. 4.

- Ogugua, I. (2008). Bride Price: The Female Customary Enslavement Mechanism in Nigerian Marriages. In Chapter 15, *Bride Price and the Implications for women's Rights in Nigeria*, Joy Ngozi Ezeilo and Josephine Edna Alumanah (ed). Joint Publication of WomenAid Collective (WACOL) in Partnership with the Faculty of Law, University of Nigeria, Enugu Campus and the Faculty of Social Sciences, University of Nigeria, Nsukka, 183-201.
- Ogunniran, I. (2010). Enforceability of Socio-Economic Rights: Seeing Nigeria through the Eyes of Other Jurisdictions. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 1(September 2010), 73-87.
- Ogunniran, I. (2015). Gender issues and the Nigerian constitution: a ray of light, or twilight on the horizon? *Gender Questions*, 3(1), 114-132.
- Ogwurike, C. (1966). Source and Authority of African Customary Law, The. *U. Ghana LJ*, 3, 11.
- Ojilere, A. (2008). The Customary Law and Socio-religious Mythology on the Rights of Women in Nigeria. *Nigerian Journal of Public Law (NJPL)*, 1(1), 257-266. Faculty of Law, University of Nigeria, Enugu campus.
- Ojilere, A. (2009). Domestic Violence and the Law in Nigeria. *CWGS- Journal of Gender Studies*, 1(4), 75-87. Centre for Women and Gender Studies, Imo State University, Owerri.
- Ojilere, A., & Chukwumaeze, U. U. (2010). CEDAW and Gender-Based Discriminations against Women in Nigeria. *Nigerian Journal of Food, Drug and Health Law (NJFDHL)*, 3(1), 95-105.
- Ojilere, A., & Gan, C. C. (2012/2013). Criminal Law (Amendment) Act, 2013: An Introductory Analysis of India's Criminal Jurisprudence on the Protection of the Sexual Independence and Dignity of Women. *Nigerian Journal of Legal Studies (NJLS) Faculty of Law, Imo State University, Owerri*, Vol. XI, 65-83.

- Ojilere, A., & Gan, C. C. (2015). Learning from the Indian Judiciary: New Directions for Securing Nigerian Women's Right to Dignity. *Asian Women*, 31(1), 81-106.
- Ojilere, A. (2012). A Comparative Critique of the Law on Rape in Nigeria and Malaysia *Nigerian Journal of Food, Drug and Health Law (NJFDHL)* Vol. 5 No. 1 Faculty of Law, Kogi State University, Anyigba, 41-53.
- Okeke, G. N. & Okeke, C. (Jan. -Feb. 2013). The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria. *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*, 7(6), 9-14. www.iosrjournals.org (7/6/2014).
- Okeke, U. P. (2010). A Case for the Enforcement of Women's Rights as Human Rights in Nigeria. *The Women's UN Report Program & Network (WUNRN)* <http://www.wunrn.com> (16/7/2014).
- Okeke, V. (2008). Women's Rights: The Bride Price Snare. In Chapter 12, *Bride Price and the Implications for women's Rights in Nigeria*, Joy Ngozi Ezeilo and Josephine Edna Alumanah (ed). Joint Publication of WomenAid Collective (WACOL) in Partnership with the Faculty of Law, University of Nigeria, Enugu Campus and the Faculty of Social Sciences, University of Nigeria, Nsukka, 149-154.
- Okogbule, N. S. (2005). Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects. *SUR-Int'l J. on Hum Rts.* 3: 95.
- Okonkwo, U. U. (2013). Gender Question and National Policy in Nigeria: Historical Analysis. *Kaduna Journal of Sociology (KJS)*, 1(1), 278-287.
- Okpalaobi, B. (2014). An Evaluation of the Relevance and Enforceability of African Charter on Human and Peoples Rights in Nigeria. *AFRREV IJAH: An International Journal of Arts and Humanities* 1(1): 304-317.

- Olajide, O. E. (2014). Predictors of Women Violence and Abuse among Rural Communities' women in Akinyele Local Government Area of Oyo State, Nigeria. *African Journal for the Psychological Studies of Social Issues*, 16(2), 230-237.
- Olong, M. A. (2009). Cultural Practices and Traditional Beliefs as Impediments to the Enjoyment of Women's Rights in Nigeria. *Journal of Contemporary Legal Issues* JCLI Vol. 1, No. 1 (A publication of the Nigerian Bar Association, Idah branch, Kogi State, Nigeria), 117-131.
- Omoluabi, E., Aina, O. I., & Attanasso, M. O. (2014). Gender in Nigeria's Development Discourse: Relevance of Gender Statistics. *African Population Studies*, 27(2s), 372-385.
- Onyejekwe, C. J. (2013). Nigeria: The Dominance of Rape. *Journal of International Women's Studies*, 10(1), 48-63.
- Oppong, R. F. (2006). Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa. *Fordham International Law Journal*, 30(2), 269-345.
- Orji, N. (2010). Proof of Sexual Offences in Nigeria. *UNIZIK Law Journal* vol. 7 No. 1.
- Orjiako, G.G.I. (1995), Discriminatory Laws and Practices against Women in Nigeria. (Seminar Opening Address) Owerri. (Lagos: Constitutional Rights Project).
- Ortabag, T., Ozdemir, S., Bebis, H., & Ceylan, S. (2014). Perspectives of Young Adult Men Regarding Violence against Women: A Cross-sectional Study from Turkey. *Journal of Family Violence*, 1-10.
- Orucu, E. (2008). What Is a Mixed Legal System: Exclusion or Expansion? *J. Comp. L.*, 3, 34.

- Ouguergouz, F. (2015). *La Charte africaine des droits de l'homme et des peuples: Une approche juridique des droits de l'homme entre tradition et modernité*. (The English translation is "The African Charter on Human and Peoples' Rights: A legal approach to human rights between tradition and modernity") Graduate Institute Publications.
- Oyeduntan, A. R. (2003). 'Unemployment, Poverty and Drug dependency among Youths in Nigeria': *A paper presented at the Conference on 'Policy and Politics in a Globalising World*, University of Bristol, UK.
- Oyekale, A. S. (2014). Ethnic Characterization of Gender-Inequality and Domestic Violence against Women of Reproductive Ages in Nigeria. *Studies of Tribes and Tribals*, 12(1), 31-41.
- Oyekanmi, F. D. (2004). Socioeconomic Dimensions of Gender Equality in Nigeria. In Chapter 2 of *Paradox of Gender Equality in Nigerian Politics: Essays in Honour of Dr.(Mrs.) Veronica Adeleke*, Solomon O. Akinboye (ed) Concept Publications Ltd, Lagos, 41-61.
- Ozo-Eson, P. I. (2008). Law, Women and Health in Nigeria. *Journal of International Women's Studies* 9(3), 285.
- Paust, J. J. (1984). Human dignity as a constitutional right: A jurisprudentially Based Inquiry into Criteria and Content. *Howard LJ*, 27, 145.
- Pityana N.B. (2003). "The African Court on Human and Peoples' Rights in Municipal Law" *Seminar for Southern African States on Ratification of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights*, held in Gaborone, Botswana, 9-12 Dec., available online at <http://www.unisa.ac.39/contents/about/principle/does/municipallawdoc>.
- Plattner, M. (1995). The Status of Women under International Human Rights Law and the 1995 UN World Conference on Women, Beijing, China. *Ky. LJ*, 84, 1249-1303.

- Prempeh, H. K. (1999). A new jurisprudence for Africa. *Journal of Democracy* 10(3), 135-146.
- PuruShotam, N. (2004). Bride pride and grooming prejudices: race matters in marriage. *Untying the Knot: Marriage and Reality in Asian Marriage*, edited by GW Jones and K. Ramdas, 192-232.
- Quisumbing, A. R., Haddad, L., & Peña, C. (2001). Are women overrepresented among the poor? An analysis of poverty in 10 developing countries. *Journal of Development Economics*, 66(1), 225-269.
- Rai, U. K. "Protection of Women from Domestic Violence Act: A Search for New Paradigms" http://www.academia.edu/1342148/Protection_of_Women_from_Domestic_Violence_Act 12/11/2013.
- Rajagopal, B. (2007). Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective. *Human Rights Review*, 8(3), 157-186.
- Ramadimetja S. Mogale, Kathy Kovacs Burns, and Solina Richter (2012). Violence against Women in South Africa: Policy Position and Recommendations. *Violence against Women*, 18(5), 1. <http://vaw.sagepub.com> (24/9/2013).
- Rasool, D. I. (2015). Human Rights: Ancient Indian Jurisprudence. *Indian Journal of Legal Philosophy*, 3(2), 1-15.
- Ray, S. (2014). *To Violate with Impunity: Legal Constructions of Marital Rape*. Paper presented at the XVIII ISA World Congress of Sociology (July 13-19, 2014).
- Reed, H. (2014, July). Race and Patriarchy: Gender and Migration in South Africa During and after Apartheid. In *XVIII ISA World Congress of Sociology (July 13-19, 2014)*. Isacnf.

- Ronald Hope Sr, K. (2000). "Corruption and Development in Africa" in Ayittey, G. B. (2000). *Combating corruption in Africa: analysis and context* (pp. pp-104). London: Macmillan Press., p.17.
- Rosser, A. (2015). Law and the realisation of human rights: Insights from Indonesia's education sector. *Asian Studies Review*, 39(2), 194-212.
- Rosser, A. (2015). Realising Rights in Low Quality Democracies: Instructive Asian Cases. *Asian Studies Review*, 39(2), 180-193.
- Roznai, Y. (2014). Legisprudence Limitations on Constitutional Amendments? *Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act (April 10, 2014)*, 8(1), 29-57.
- Sachs, J. D. (2012). From millennium development goals to sustainable development goals. *The Lancet*, 379(9832), 2206-2211.
- Sachs, J. D. (2015). *The age of sustainable development*: Columbia University Press.
- Sanni, A. (2011). Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for Far-reaching Reform. *11 Afr. Hum. Rts. L.J.* 511.
- Sarkin, J. (1998-1999). The effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and interpretation of Human Rights Provisions. *U. Pa. J. Const. L* 1, 176.
- Sayadmansour, A., & Momenirad, A. (2014). An Argument against Considering Women's Rights as All Belonging to the Category of Human Rights. *Chinese Journal of International Law*, jmu018.
- Schachter, O. (1983). Human Dignity as a Normative Concept. *77 American J of int L* 848-854.

- Secker, E. (2012). Witchcraft stigmatization in Nigeria: Challenges and successes in the implementation of child rights. *International Social Work*, 56(1) 22–36.
- Sehinde, B. K. (2013). An Overview of Legal and Implementation Framework of Nigeria's National Gender Policy. In Chapter 7 of *Gender and Power Relations in Nigeria*, Ronke Iyabowale Ako-Nai (ed). Lexington Books, Plymouth, UK, 87-100.
- Shaffer, P. (1998). Gender, Poverty and Deprivation: Evidence from the Republic of Guinea. *World Development*, 26(12), 2119-2135.
- Shapiro, M. (2013). The Mighty Problem Continues. In D. Kapiszewski, G. Silverstein & R. A. Kagan, (Eds.), *Consequential Courts- Judicial Roles in Global Perspective* (pp. 380-397). New York, USA: Cambridge University Press.
- Sindjoun, L. (1996). La civilisation internationale des mœurs: éléments pour une sociologie de l'idéalisme structurel dans les relations internationales. *Études Internationales*, 27(4), 841-859. (The English translation is "Sindjoun, L. (1996). The international civilization of manners: Elements for a sociology of structural idealism in international relations. *International Studies*, 27 (4), 841-859).
- Sinha, M. K. (1998). Role of the National Human Rights Commission of India in the Implementation of Human Rights, The. *Neth. Q. Hum. Rts.*, 16, 101.
- Sircar, O., & Mandal, S. (2013). What's law got to do with justice? *Infochange Agenda*, March (26), 2-6.
- Sloth-Nielsen, J., & Mezmur, B. D. (2008). 2+ 2= 5-Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006). *Int'l J. Child. Rts.*, 16, 1.
- Smythe, D. (2004, June) Norms and Architecture: Limits on Rape Law in South Africa, Conference Papers—*Law & Society Association*. Retrieved from http://www.allacademic.com/meta/p117019_index.htm.

- Spamann, H. (2009). Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law. *BYU L. Rev.*, 1813.
- Sunstein, C. R. (2001). Social and economic rights? Lessons from South Africa. *John M. Olin Program in Law and Economics Working Paper No. 124*.
- Swiss, S & Giller, J. E. (1993). Rape as a Crime of War: A Medical Perspective. *JAMA (The Journal of American Medical Association)* 270(5), 612-615.
- Taiwo, E. A. (2009). Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision. *African Human Rights Law Journal*, 9(2), 546-575.
- Takura, C. (2011). The SADC Gender Protocol: Are the 2015 Objectives Achievable? Ngo Pulse. Cited in Gemma Hancox (October 25th, 2012) Marital Rape in South Africa: Enough is enough, BUWA! A Journal on African Women's Experiences, 70-74, <http://www.osisa.org/buwa/south-africa/marital-rape-south-africa> (13/10/2013).
- Tambiah, S. J., Goheen, M., Gottlieb, A., Guyer, J. I., Olson, E. A., Piot, C., ... & Vuyk, T. (1989). Bridewealth and dowry revisited: The position of women in Sub-Saharan Africa and North India [and comments and reply]. *Current Anthropology*, 413-435.
- Thompson, J. B. (2015). Relationship between International Law and Municipal Law: History, Theories, Status, and Related Aspects *Universal Jurisdiction: The Sierra Leone Profile* (pp. 15-27): Springer.
- Uchegbu, P. A. (1981). The Concept of right to Life under the Nigerian Constitution. *Essays in Honour of Judge TO ELIAS; ed. JA OMOTOLA, UNI-LAG*, 153.
- Udayanganie, U. T. (2014). Expanding the Scope of Judicial Review using Constitutional Interpretation in Sri Lanka: A Comparative Study of the Development of Judicial Review in UK. *Journal of Law and Social Sciences, (JLSS)* 3(1).

- Udombana, N. J. (2005). Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies. *African Human Rights Law Journal*, 5(1), 47-69.
- Unnithan, M., & Pigg, S. L. (2014). Sexual and Reproductive Health Rights and Justice—Tracking the Relationship. *Culture, health & sexuality*, 16(10), 1181-1187.
- Ushe, U. M. (2015). Eradicating Sexual Abuse and Gender Based Violence in Africa and America: Role of Religious Leaders. *European Scientific Journal*, 11(5), 99-116.
- Vickers, J. (2013). Territorial Pluralism and Family-Law Reform: Conflicts between Gender and Culture Rights in Federations, North and South. *Politikon*, 40(1), 57-82.
- Viljoen, F. (2001). Africa's Contributions to the Development of International Human Rights and Humanitarian Law. *African Human Rights Law Journal* 20.
- Viljoen, F. (2009). An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. 16 *Washington & Lee Journal of Civil Rights & Social Justice* 17.
- Vincent, N. & N. Kenneth (2014). Nigeria and the Attainment of Sustainable Development in the 21st Century. *Mediterranean Journal of Social Sciences* 5(4): 645.
- Walton, A. D. (2013). Just Men? Towards the Education of Men for Gender Justice in a Context of Religiously Legitimised Patriarchy: A South African Case Study. *International Journal of Educational Development*, 33(6), 604-611.
- Watts, C., & Zimmerman, C. (2002). Violence against Women: Global Scope and Magnitude. *The Lancet*, 359(9313), 1232-1237.

- Wiseberg, Laurie S., & Harry M. Scoble. (1981). Women's Rights and International Human Rights: A Bibliographical Note. *Human Rights Quarterly* 3(2), 127-135.
- Yerima T. F. (2009). African Continental Human Rights Courts: Features and Comparative Critique with the European and Inter-American Courts of Human Rights. *Journal of Contemporary Legal Issues, Vol. 1 No. 1*, 20-34.
- Yerima, T. F. (2011). Comparative Evaluation of the Challenges of African Regional Human Rights Courts. *Journal of Politics and Law*, 4(2).
- Yusuf, A. O. (2007-2009). Gender Inequality and Selective Victimization under the Nigerian Law of Rape. *Ahmadu Bello University, Zaria Journal of Private and Comparative Law (JCPL)* Vol. 2 & 3.
- Yusuf, H. B. (2005). Sexuality and the marriage Institution in Islam: an Appraisal. *African Regional Sexuality Resource Center*.
- Zhu, G. (2013). Weak Courts, Weak Rights: Assessing the Realisation of Constitutional Rights in PRC Courts. *Hong Kong Journal of Law, HKJL*, 43 (2), 713-744.

Newspapers, Online and Web Pages

- “A 23-year-old Indian student was fatally gang-raped inside a bus in the capital, Delhi last December. The attack caused international outrage and prompted India to introduce stringent anti-rape laws. A court later sentenced her attackers to death.” (BBC NEWS Asia, 16 December 2013).
<http://www.bbc.com/news/world-asia-india-25344403> (26/7/2014).
- Ezea, S. (2011). “How the National Assembly Members Squander Nigerian Resources”, *Guardian*, Saturday May 21, P54.
- “Captured by Cotton – Exploited Dalit Girls Produce Garments in India for European and US Markets”, Amsterdam, the Netherlands, May 2011,
http://somo.nl/publications-en/Publication_3673, (14/4/2013).

“Explaining India’s new anti-rape laws” (Explanatory interview of eminent Indian Supreme Court lawyer Karuna Nundy), BBC NEWS Asia, 28 March 2013.
<http://m.bbc.com/news/world-asia-india-21950197>, (25/7/2014).

“How Nigeria legalizes discrimination against women” by Aminu Hassan Gamawa, Premium Times Newspaper Online of 28 July, 2013.
<http://www.premiumtimesng.com/opinion/141797-how-nigeria-legalizes-discrimination-against-women-by-aminu-hassan-gamawa.html> (26/5/2015).

“Maid in India: Young Dalit Women Continue to Suffer Exploitative Conditions in India’s Garment Industry,” April 2012 Joint report of findings on the labour conditions in the South Indian garment and textile industry. http://somo.nl/publications-en/Publication_3783. (14/4/2013).

“Nigerian Senate Passes the Sexual Offences Bill, 2015 which prescribes life imprisonment for sexual intercourse with a person below 11 years of age.” IBT Media Inc. <http://www.ibtimes.com/nigerian-senate-approves-life-imprisonment-child-rapists-1953232> (5/6/2015).

“The Nigerian Senate passes 46 bills in 10 minutes!” The Guardian Newspaper Online, 4 June 2015. <http://www.nguardiannews.com/2015/06/senate-dumps-own-rules-passes-46-bills-in-10-mins/> (5/6/2015).

24-hour help desk centres set up for women and children in India. Kerala Women: An initiative of Kerala State Social welfare Department
<http://www.keralawomen.gov.in/index.php/headlines/333-24-hour-gender-help-desk-centres-for-women-and-children>. (18/5/2015).

“Activists Welcome India's Anti-rape Law, With Caution” Agence France-Presse (AFP) Wednesday, 20 March, 2013, South China Morning Post, International Edition: Asia. <http://www.scmp.com/news/asia/article/1195588/activists-welcome-indias-anti-rape-law-caution> (29/10/2014).

African Commission on Human and Peoples’ Rights established by the African Charter on Human and Peoples’ Rights para. 2(xi) of Decision ASS/AU/Dec. 1(I).
http://www.who.int/hhr/Human_and_Peoples_rights.pdf. (13/4/2015).

African Commission on Human and Peoples’ Rights
<http://www.achpr.org/instruments/women-protocol/ratification/> (20/10/2014).

Agitation for specific comprehensive legislation on disability rights to protect Indian Women from sexual violations by Swagata Raha. Infochange India, <http://infochangeindia.org/disabilities/analysis/india-needs-new-legislation-on-disability-rights.html> (8/6/2015).

Asia Pacific Forum on Women, Law and Development (APWLD), Feminist Law and Practice, <http://apwld.org/our-work/feminist-law-and-practice/>. (19/5/2014).

Available statistics show that in Rajasthan, the number of female police investigating and prosecuting officers currently serving in the state is at par with their male counterparts. Government of the State of Rajasthan, <http://www.police.rajasthan.gov.in> (5/5/2015).

British Council, Nigeria (2012). Gender in Nigeria Report 2012: Improving the Lives of Girls and Women in Nigeria- Issues, Policies, Action (2nd ed.). Department of International Development, British Council Nigeria. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67333/Gender-Nigeria2012.pdf (22/5/2015).

Centre for Research on Multinational Corporations (SOMO) and the India Committee of the Netherlands (ICN) titled “Maid in India: Young Dalit Women Continue to Suffer Exploitative Conditions in India’s Garment Industry.” (http://somo.nl/publications-en/Publication_3783, (14/4/2013).

Criminal Bureau of Investigation in India called to probe a sitting parliamentarian who threatened to ensure rape of the wives and daughters of opposition members. Oneindia News, 5 July 2014, <http://news.oneindia.in/india/sc-moved-seeking-cbi-probe-against-tapas-pal-s-remarks-1477556.html> (12/7/2014).

Daily Post, <http://dailypost.ng/2013/07/13/70-of-nigerian-women-are-living-below-poverty-line-minister/>. (22/4/2015).

DNA India. <http://www.dnaindia.com/india/report-nirbhaya-fund-of-rs1000-crore-for-womens-safety-announced-1805651> (19/5/2015).

Duhaime's Encyclopedia of Law <http://www.duhaime.org/> (6/7/2015).

Even physically disabled women and girls are victims of rape in India and therefore deserve legal protections too. First Post India, http://www.firstpost.com/india/physically-disabled-teenager-raped-in-kolkata229315.html?utm_source=ref_article.

FACT SHEET: A summary of the rights under the Convention on the Rights of the Child, http://www.unicef.org/crc/files/Rights_overview.pdf (11/3/2014).

Fagan, A. (2006). Human Rights. The Internet Encyclopaedia of Philosophy. Retrieved from <http://www.iep.utm.edu/hum-rts/> (15/6/2015).

Gemma Hancox (October 25th, 2012) Marital Rape in South Africa: Enough is enough, BUWA! A Journal on African Women's Experiences, 70-74, <http://www.osisa.org/buwa/south-africa/marital-rape-south-africa> (13/10/2013).

Gender Index http://genderindex.org/country/nigeria#_ftn1 (13/5/2015).

Glyn, *Bride Price: African Pride or Prejudice?* <http://www.feelfreenetwork.org/index.php/bride-price>, (26/5/2013).

History of the South Africa Constitutional Court
<http://www.justice.gov.za/sca/historysca.htm> (2/6/2014).

Indian government bans *Uber* Online Taxi services following a rape by one of its drivers. The Times of India, Delhi 8 Dec, 2014: <http://timesofindia.indiatimes.com/city/delhi/Delhi-govt-bans-Uber-cab-service-following-rape-incident/articleshow/45411516.cms> (28/4/2015).

Indian government launches a special bank, Bharatiya Mahila bank [BMB] for women. Zee News India. http://zeenews.india.com/business/news/economy/bharatiya-mahila-bank-for-economic-empowerment-of-women-pm_89058.html (25/11/2013).

Indian Police gang-rape woman after she failed to pay bribe for her husband's release from custody. The Guardian, 12 June 2014, <http://www.theguardian.com/world/2014/jun/12/indian-police-gang-rape-uttar-pradesh> (12/7/2014).

Indian Supreme Court sets up a "Social Justice Bench" Law Resource India, 3 December 2014, India Lawyers <https://indialawyers.wordpress.com/2014/12/03/supreme-court-constitutes-a-special-bench-titled-as-social-justice-bench-for-hearing-matters-related-to-women-and-children/> (30/4/2015).

Japan International Cooperation Agency (JICA) Public Policy Department, (March 2011). Country Gender Profile Nigeria: Final Report (pp. 10-13), Summary at pp. iv-v. http://www.jica.go.jp/english/our_work/thematic_issues/gender/background/pdf/e10nig.pdf (14/5/2015).

Maja Daruwala (ed). (2005) "Human Rights and Policing: Landmark Supreme Court Directives and National Human Rights Commission Guidelines." CHRI, New Delhi, Biennial Report on Human Rights Issues to the Commonwealth Heads of Government Meet, CHOGM.
http://www.humanrightsinitiative.org/publications/hrc/humanrights_policing.pdf.

Media reports of alleged gang rape and hanging of 2 girls in India sparks global outrage. CNN International edition, 30 May 2014, <http://edition.cnn.com/2014/05/29/world/asia/india-gang-rape/>, (12/7/2014).

Migration and Human Rights, Council of Europe.
http://www.coe.int/t/democracy/migration/bodies/echr_en.asp (26/12/2015).

"The honest truth is that I don't know the actual place and state of the girls. The more reason we are trying to be very careful before we negotiate with any group. Before we negotiate with any group, we must make sure they show us the actual location of the girls. We must make sure they are complete."Morgan Winsor, "Buhari Presidential Media Chat: Nigeria Willing To Negotiate With Boko Haram To Save Chibok Girls" *International Business Times*, Wednesday, 30 December, 2015. <http://www.ibtimes.com/buhari-presidential-media-chat-nigeria-willing-negotiate-boko-haram-save-chibok-girls-2244763> (31/12/2015).

National Human Rights Commission, Nigeria. <http://www.accessfacility.org/national-human-rights-commission-nigeria>. (4/11/2014).

Nayak, A. (2011). List of Government Schemes Available for Economic Empowerment of Women in India. <http://www.wcd.nic.in/schemes.htm>.

Nelson Mandela, Presidential Speech at the formal inauguration of the South Africa Constitutional Court in Johannesburg on 15th February, 1994, <http://hooyberglaw.wordpress.com/2013/12/06/president-nelson-mandelas-speech-at-the-inauguration-of-the-constitutional-court/>, (24/7/2014).

Newswatch Magazine (Nigeria), Aug. 24, 2009.

Nigeria's Minister of Women Affairs and Social Development, Hajia Zainab Maina, expressed worries on 14th September, 2013 over the failure of the National Assembly to domesticate the CEDAW.
<http://http.ngrguardiannews.com/national-news/132759-minister-decries-non-domestication-of-cedaw-gender-bil>. (14/3/2014).

Non-Governmental Organisations, reports of UN human rights bodies (accessed from the Official website of the United Nations. <http://www.un.org/en/>

O’Keefe, P., Unit, H. D., & Region, d. E. A. (2007). People with disabilities from India: from commitments to outcomes. *Human Development Unit, South East Asia Region, The World Bank*, 157; http://siteresources.worldbank.org/INDIAEXTN/Resources/295583-1220435937125/Philip_Okeefe_1_1a.pdf (8/6/2015).

Oby Nwankwo, Nigeria’s Representative on the CEDAW Committee has said that “*Nigeria is notorious for violating international agreements.*” See *Nigerian vanguard Newspaper* of 22 September, 2013, interview by Josephine Igbinovia, <http://www.vanguardngr.com/2013/09/nigeria-is-notorious-for-abandoning-international-treaties-oby-nwankwo/> (26/9/2013).

OECD Development Centre (2014). Social Institution and Gender Index (SIGI): Nigeria. <http://www.nigeriarights.gov.ng/> (4/11/2014).

Official website of the South African Constitutional Court <http://www.constitutionalcourt.org.za/site/home.htm>.

Official website of the Supreme Court of Appeal of South Africa. <http://www.justice.gov.za/sca/index.htm>.

Official website of the Department of Justice and Constitutional Development of South Africa. <http://www.justice.gov.za>.

Renowned Indian jurist and committee chair for the reform of the Indian criminal jurisprudence on rape which led to the enactment of the Criminal Law (Amendment) Act, 2013 is dead. Indian Express Newspaper of Tuesday, 23 April 2013. <http://archive.indianexpress.com/news/justice-verma-the-face-of-judicial-activism-dies-of-multiple-organ-failure/1106404/>. (14/11/2014).

Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, Geneva, Switzerland: United Nations; 1993, United Nations document E/CN.4/1993/50.

Sexual Exploitation against Women, published in the newsletter *Civil Service of India*, <http://www.civilserviceindia.com/subject/Essay/sexual-exploitation-against-women.html> (28/3/13).

Shadow of OJ Simpson falls over Oscar Pistorius after acquittal for murder by Alexander, H. and A. Laing (2014). The Telegraph, UK, <http://www.telegraph.co.uk/news/worldnews/oscar-pistorius/11094653/Shadow-of-OJ-Simpson-falls-over-Oscar-Pistorius-after-acquittal-for-murder.html> (14/9/2014).

Siwan Anderson and Debraj Ray, *How India Treats its Women*, BBC News India, <http://www.bbc.com/news/world-asia-india-20863860> (2/6/2014).

Six-year-old Indian girl raped in Bangalore school by staff members. BBC NEWS Asia, 17 July 2014. <http://www.bbc.com/news/world-asia-india-28340617>, (25/7/2014).

Stop Violence against Women. *Domestic Violence Law and Policy*, University of Minnesota Human Rights Library, <http://www1.umn.edu/humanrts/svaw/domestic/laws/international.htm>. (16/3/2014).

Stridhan generally refers to “what a woman can claim as her own property within a marital household. It may include her jewellery (gifted either by her family), gifts presented to her during the wedding or later, and the dowry articles given by her family.” Wikipedia http://en.wikipedia.org/wiki/Dowry_law_in_India#Stridhan 12/11/2013.

Summary Report of the Verma Committee on Amendments to Criminal Law, 2013, PRS Legislative Research, Centre for Policy Research, India, 25 January 2013. www.prsindia.org; <http://www.prsindia.org/administrator/uploads/general/1359132636~~Justice%20Verma%20Committee%20Report%20Summary.pdf> (30/10/2014).

Sunday Tribune Newspaper (Nigeria), May 19, 1991.

Sustainable Development Goals of the United Nations, launched and adopted on 25 September, 2015. <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (2/12/2015).

Ten year old girl raped at the command of a village chief in India. news.com.au 11 July 2014, <http://www.news.com.au/world/girl-10-raped-at-the-command-of-village-chief-in-jharkhand-india/story-fndir2ev-1226985244797> (12/7/2014).

Text of Indian PM's Message on International women's day, March 8, 2015, <http://www.narendramodi.in/text-of-pms-message-on-international-womens-day>; <http://www.ndtv.com/india-news/committed-to-bring-positive-change-in-womens-lives-prime-minister-narendra-modi-744962> (18/5/2015).

Text of Nigeria's President-elect, Mohammadu Buhari's Message on International women's day, March 8, 2015, Vanguard Newspaper, Nigeria Online, 8 March, 2015. <http://www.vanguardngr.com/2015/03/womens-day-buhari-restates-commitment-to-empowering-women/#sthash.MWZJXIWp.dpuf> (18/5/2015).

The "Soteria" android application launched to help women and girls in distress. Kerala Women: An initiative of Kerala State Social Welfare Department-<http://www.keralawomen.gov.in/index.php/headlines/260-android-application-soteria-to-help-women> (20/5/2015).

The addresses and social media pages of Indian PM Narendra Modi where women whose dignity have been violated can send complaints directly to the PM, especially if they fear that the police or other authorities may suppress their complaints for whatever reasons. YouTube Channel: youtube.com/user/narendramodi. <http://www.indiancelebinform.com/2014/10/narendra-modi-office-contact-address-email-phone-number-website.html> (29/4/2015).

The Calgary Board of Education, Media Services, 2005, describes globalization as "The process of making something worldwide in scope or application" See <http://schools.cbe.ab.ca/logistics/g.html>. (17/6/2015).

The Commission on Human Rights, <http://www.un.org/en/documents/udhr/history.shtml> (3/3/2014).

The Encarta Dictionary.

The Free Merriam-Webster Dictionary <http://www.merriam-webster.com/dictionary/immolate> (25/5/2013).

The Guardian, <http://www.theguardian.com/commentisfree/2014/jun/17/sexual-violence-india-patriarchal-narendra-modi-women-reform-rape>. (14/11/2014).

The National Assembly, Federal Republic of Nigeria. <http://www.nassnig.org/#> (16/4/2015).

The New Sunday Times Newspaper, (PP412/08/2012 (030980) of April 14, 2013.

The Nigerian National Gender Policy, NGP 2006.

The Nigerian NGO CEDAW Coalition: A Shadow Report (2008) 26.

The Paris principles have been applauded as “*the foundation and reference point for the establishment and operation of national human rights institutions*.” Asia Pacific Forum, http://www.asiapacificforum.net/about/paris_principles.html. (25/10/2013).

The Punch Newspaper, *Editorial Comment*, Aug. 13, 2009.

The retention of rape as a gender-specific crime has become legislatively faulty because after all, women in Ireland and England have been convicted for rape. Mary Keny, Women beware women, *The Guardian*, (March 19, 2001) <http://www.guardian.co.uk/world/2001/mar/19/gender.uk>.

The South Africa Constitutional Court, <http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases> (7/6/2013).

The South Africa's Supreme Court of Appeal found the Olympic athlete Oscar Pistorius guilty of murder and overturned the earlier manslaughter verdict, holding that the lower court did not correctly apply the rule of *dolus eventualis*, that is, whether Pistorius knew that a death would be a likely result of his actions. The court therefore ordered that the convict be sent back to the lower court for resentencing: BBC News Africa of 3 December 2015 titled “*Oscar Pistorius guilty of murdering Reeva Steenkamp*”. <http://www.bbc.com/news/world-africa-34993002> (4/12/2015).

The Times on India, March 20, 2013. “Women's activists sore with rape law” <http://timesofindia.indiatimes.com/india/Womens-activists-sore-with-rape-law/articleshow/19081635.cms> (29/10/2014).

The UN Millennium Development Goals, the United Nations, September 2000, Joint United Nations Programme on HIV/AIDS (UNAIDS), <http://www.unaids.org/en/aboutunaids/unitednationsdeclarationsandgoals/2000millenniumdevelopmentgoals> (9/5/2014).

The UN Sustainable Development Goals “A Sustainable Development Agenda, the United Nations Development Programme (UNDP), 25 September 2015, <http://www.undp.org/content/undp/en/home/mdgoverview.html> (10/11/2015).

The United Nations named two Congolese army colonels who appear to be blocking an investigation of soldiers accused of mass gang-raping at least 47 women in eastern Congo, and said if the attackers are not identified the officers themselves should stand trial for the crimes committed by the troopers under their command. THEWORLDPOST (A Partnership of The Huffington Post and Berggruen Institute on Governance) of 2 March, http://www.huffingtonpost.com/2011/07/22/congo-mass-rapes-by-govern_906624.html (2/3/2014).

The United Nations, ICELANDIC HUMAN RIGHTS CENTRE. <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/humanrightsfora/theunitednations/>. (12/3/2014).

The Universal Declaration of Human Rights, 1948, United Nations General Assembly. <http://www.un.org/documents/ga/res/48/a48r104.htm> (15/3/2014).

There is evidence that victims reported cases of domestic violence to police or social workers, but their pleas for help fell on deaf ears or (they) were told to resolve the matter with their partners. TheWorldPost, 3/8/2013: http://www.huffingtonpost.com/2013/03/08/south-africa-violence-against-women_n_2837804.html (30/4/2015).

Thirteen men in West Bengal, gang-raped a 20-year old tribal woman on the orders of village elders, as punishment for having a relationship with a man from a different community. National Legal Research Desk, 28 Mar 2014). <http://nlrd.org/author/ravikantsv> (29/3/2014).

UN Commission on Human Rights Resolution 1994/95, UN Doc. E/CN.4/1995/42, 22 November, 1994.

UN Division for the Advancement of Women, Published by the United Nations Department of Public Information C DPI/2040 C May 1999. <http://www.un.org/womenwatch/daw/cedaw/cedaw20/ending.htm> (2/4/2014).

UN Human Development Report 2013, <http://hdr.undp.org/en/2013-report>. (6/5/2015)

UN Human Rights, Office of the High Commissioner for Human Rights. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. (9/3/2014).

UN WOMEN: United Nations Entity for Gender Equality and the Empowerment of women. <http://www.un.org/womenwatch/daw/cedaw/>. (13/3/2014).

UN Women's global strategic plan 2011-2013 Development Results Framework goal 3:
To Prevent Violence against Women and Girls and expand access to services
<http://www.unwomenpacific.org/pages.cfm/our-programmes/evaw/>.

Under the Nigerian penal Code, an assault by a man on a woman is not an offense if they are married, if native law or custom recognizes such "correction" as lawful, and if there is no grievous hurt. EQUALITY NOW:
http://www.equalitynow.org/the_penal_code_of_northern_nigeria (26/5/2015).

UNDP Nigeria/UN Gender Theme Group Nigeria (2013) Gender Briefing Kit, http://www.ng.undp.org/content/dam/nigeria/docs/IclusiveGrwth/UNDP_N_G_inclusiveGrwth_Gender-Briefing-Kit230513.pdf (15/5/2015).

Unicef Malaysia, http://www.unicef.org/malaysia/about_crc.html. (29/10/2014).

United Nations Charter, <http://www.un.org/en/documents/charter/intro.shtml>.

United Nations Convention against Torture, 1984.
<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/318c0b6ba6c1de07c12572f10025d5e6?Opendocument>. (2/4/2014).

United Nations Convention on the Rights of the Child (UNCRC),
<http://www.education.gov.uk/childrenandyoungpeople/healthandwellbeing/b0074766/uncrc>. (10/3/2014).

United Nations, Outreach Programme on the Rwanda Genocide and the United Nations.
Background Information on Sexual Violence used as a Tool of War.
<http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml>
(29/12/2015).

Universal Declaration of Human Rights, 1948
<http://www.ohchr.org/en/udhr/pages/introduction.aspx> (4/3/2014).

US Department of State (17 April 2012) "Background Note: India".

When a woman consents to sex out of fear or coercion, it is rape, and the perpetrator should not be allowed to get away with the offence by the mere fact that he is married to the survivor; Center for Research on Partner Violence.
www.welleslev.edu. (20/10/2014).

WHO says that in the Sub Sahara Africa, Middle East and Asia, 2 million or more suffer VVF all over the world (NPO Japan VVF website) <http://blog.fistula-japan.org/> (14/5/2015).

Women Protocol to the African Charter. 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force Nov. 25, 2005. <https://www1.umn.edu/humanrts/africa/protocol-women2003.html>. (10/4/2015).

Women's Rights Initiative, *Constitutional and Legal Provisions for Women in India*, National Legal Research Desk. http://nlrd.org/womens-rights-initiative/legislations-laws-related-to-women/constitutional-and-legal-provisions-for-women-in-india?subscribe=success#blog_subscription-2 (13/7/2014).

World Bank Report, 2012, http://siteresources.worldbank.org/EXTANNREP2012/Resources/8784408-1346247445238/AnnualReport2012_En.pdf (7/7/2015).

LIST OF PUBLICATIONS AND PAPERS PRESENTED

Journal Articles (Published)

Ojilere, A., & Gan, C. C. (2012/2013). **Criminal Law (Amendment) Act, 2013: An Introductory Analysis of India's Criminal Jurisprudence on the Protection of the Sexual Independence and Dignity of Women.** *Nigerian Journal of Legal Studies (NJLS) Faculty of Law, Imo State University, Owerri. Vol. XI*, 65-83.

Ojilere, A., & Gan, C. C. (2015). **The Protection of Women's Dignity and Sexual Rights in International Law: Basic Lessons on Core Thematic Human Rights Documents.** *Orient Law Journal*, 2(January), 61-81. Nigerian Bar Association, Owerri, Imo State.

Ojilere, A., & Gan, C. C. (2015). **Learning from the Indian Judiciary: New Directions for Securing Nigerian Women's Right to Dignity.** *Asian Women*, 31(1), 81-106. (ISI Full-Length Article)

Journal Articles (Accepted for Publication)

Aloy Ojilere, Gan, C. C & Chukwumaeze, U. U. (2015). **Where There Is No Law: Judicial Guidelines for Protecting Nigerian Women's Sexual Dignity at the Workplace: Lessons from India.** *Imo State University Journal of Public Law*, Vol. 2, Department of Public Law, Imo State University, Owerri, Nigeria.

Aloy Ojilere & Gan C. C. (2015). **Globalization and Judicialization of Socio-economic Rights in India and South Africa: Catalysts for New Directions in Nigeria.** *Comparative Constitutional Law & Administrative Law Quarterly (CALQ)*, Vol 2.4, National Law University, Jodhpur, Rajasthan, INDIA.

Journal Articles (Under Peer Review)

Ojilere, A. & Gan, C. C. (2015). Globalization and Judicialization of Socio-Economic Rights in Nigeria: Quest for Transformative Constitutionalism and/or Judicial Activism. African Human Rights Law Journal [AHRLJ], Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa.

Ojilere, A. & Gan, C. C. (2015). Securing Women's Right to Dignity as Human Rights in Nigeria: New Directions from India and South Africa. Journal of Comparative Law [JCL], School of Oriental and African Studies, University of London.

Ojilere, A. (2015). Legalization of Same-Sex Marriage in the United States of America: The Judicial Endorsement of an Impossibility. Catholic University Law Review, Columbus School of Law, The Catholic University of America, Washington DC, USA.

Conference Papers

Ojilere, A. & Gan, C. C. "Criminal Law (Amendment) Act, 2013: Legislative Activism in the Protection of the Dignity and Sexual Independence of Women in India." Virtual Presentation at the Asian Symposium on Human Rights Education held 2-4 August 2014 at the Mitsui Garden Hotel, Hiroshima, Japan.

Ojilere, A. & Gan, C. C. "Protecting Women's Right to Dignity: Analytical Evaluation of the Legal framework in Nigeria, India and South Africa." Presented at the KANITA Postgraduate International Conference on Gender Studies (KPICGS) 2014 held 13-14 August 2014 at the Auditorium INFORMM, Universiti Sains Malaysia (USM), Penang, Malaysia. Organized by the Women's Development Research Centre (KANITA), Universiti Sains Malaysia (USM). Theme: "Marginality, Inclusiveness and Social Justice: Contemporary Challenges in Researching Women, Men and Gender." (Abstract published at page 26 of Conference Proceedings, and Full Paper published in Conference CD).

Ojilere, A. & Gan, C. C. **“Judicial Creativity and Activism in the Enforcement of Fundamental Rights in India: A Roadmap for the Globalization of Human Rights and Constitutionalism in Nigeria.”** Presented at the Third National Conference on Law and Justice 2015 [NCLJ-2015] held 10-11 October 2015 at the School of Law, Auro University, Surat, Gujarat, India. (Full Paper Published in Conference Proceedings, ISBN No: 13:9788192818962, Pg. 255, Theme: Critical Assessment of Justice Delivery System.